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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 89

THE UNITED STATES OF AMERICA, APPELLANT

vs.

NATIONAL LEAD COMPANY, TITAN COMPANY,
INC., AND E. I. DU PONT DE NEMOURS AND
COMPANY, INC.

No. 90

NATIONAL LEAD COMPANY AND TITAN
COMPANY, INC., APPELLANTS

vs.

THE UNITED STATES OF AMERICA

No. 91

E. I. DU PONT DE NEMOURS AND COMPANY, INC.,
APPELLANT

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED APRIL 18, 1946

VOLUME I—PAGES 1 TO 674

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2 In the District Court of the United States
for the Southern District of New York
Civil No. 26-258

UNITED STATES OF AMERICA, PLAINTIFF,

v.

NATIONAL LEAD COMPANY, TITAN COMPANY, INC., E. I. DU
PONT DE NEMOURS AND COMPANY, INC., DEFENDANTS.

Complaint

Filed June 24, 1944

The United States of America, plaintiff, by its attorneys acting under the direction of the Attorney General of the United States brings this action against the defendants and complains and alleges as follows:

JURISDICTION AND VENUE.

~~1. This~~ complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," in order to prevent and restrain violations by defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Anti-trust Act. Each of the defendants is a corporation and each has an office, transacts business, and is found within the Southern District of New York. Defendants National Lead Company and Titan Company, Inc. both have their respective principal offices in the Southern District of New York.

DESCRIPTION OF DEFENDANTS

2. National Lead Company (hereinafter sometimes referred to as National), a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business at 111 Broadway, New York, New York, is made a defendant herein. Defendant National is one of the largest manufacturers of pigments in the United States, with total assets in excess of \$100,000,000. It is also the largest manufacturer of titanium compounds in the world, manufacturing at least 50 per cent of such compounds produced in the United States.

3. Titan Company, Inc. (hereinafter sometimes referred to as Titan Inc.), a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 111 Broadway, New York, New York, is made a defendant herein. Approximately 87 per cent of the stock of defendant Titan Inc. is owned by the defendant National. Defendant Titan Inc. now owns, and throughout the period of time covered by the conspiracy hereinafter alleged, has owned large numbers of patents and held exclusive licenses, with the right to grant sublicenses, under many patents relating to the manufacture and use of titanium compounds. Defendant Titan Inc. also owns the following percentages of the voting stock of the following named foreign companies:

British Titan Products Co., Ltd.	49%
Titangesellschaft, g.m.b.h.	50%
Societe Industrielle du Titane	78%
Titan Co., A/S	100%
Titan Kogyo Kabushiki Kaisha	17½%

Since its formation in 1929, defendant Titan Inc. and all of its policies and activities have been controlled by defendant National, and a majority of Titan Inc.'s officers and directors are, and at all times have been, officers and directors of defendant National.

4. E. I. du Pont de Nemours and Company, Inc. (hereinafter sometimes referred to as du Pont), a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business at Wilmington, Delaware, is made a defendant herein. Defendant du Pont is the largest chemical company in the United States, having assets in excess of \$1,000,000,000. It

is also one of the largest manufacturers of pigments in the United States and the second largest manufacturer of titanium compound in the world, manufacturing approximately 45% of such compounds made in the United States.

THE CO-CONSPIRATORS

5. The Titanium Pigments Company, Inc. (hereinafter sometimes referred to as Titanium Pigments), a corporation organized in 1916 and, until its dissolution in 1936, existing under the laws of the State of Maine, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Prior to 1920 Titanium Pigment had erected a factory in Niagara Falls,

New York, for the manufacture of titanium compounds and was there manufacturing said compounds. In or about 1920 defendant National acquired a substantial stock interest in said company, and in 1932 acquired all its stock. Until 1936 defendant National conducted all activities relating to the manufacture and sale of titanium compounds through said company. In 1936 defendant National dissolved said company and thereafter conducted its titanium operations directly. During the period 1920 to 1936, defendant National controlled all of the policies and activities of Titanium Pigment.

6. Krebs Pigment & Color Corporation (hereinafter sometimes referred to as Krebs), a corporation organized and, until its dissolution in 1936, existing under the laws of the State of Delaware is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. In 1931 the defendant du Pont acquired a company of the same name as Krebs, which company was an old established manufacturer of pigments. At or about the same time, said defendant du Pont organized a new company, Krebs, acquired approximately 70% of its capital stock, and turned over to it the assets of the old company of the same name, as well as all the assets of the Commercial Pigments Company, which at that time was a corporation engaged in manufacturing titanium compounds in the United States under a license from one Blumenfeld, as is hereinafter more particularly set forth.

From 1931 to 1936 defendant du Pont manufactured and sold titanium compound through Krebs. In 1936 defendant du Pont acquired all of the assets of Krebs and dissolved said company, thereafter conducting to the present time all of its titanium operations directly through the Krebs Division of defendant du Pont.

7. Titan Co. A/S (hereinafter sometimes referred to as Titan A/S), a corporation organized and existing under the laws of the Kingdom of Norway with its office and principal place of business at Fredrikstad, Norway, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Titan A/S originally owned the Jehsen patents, hereinafter referred to, and for some time prior to 1920 and until 1927 was engaged in the manufacture of titanium compounds in Norway. Titan A/S was the owner of large deposits of ilmenite. In 1927 defendant National acquired approximately 87 per cent of the stock of Titan A/S and,

since that time, has controlled the policies and activities of said company. Since about 1927, co-conspirator Titan A/S has discontinued the manufacture of titanium compounds and has purchased all such compounds sold by it from co-conspirator Titangesellschaft.

8. Interessengemeinschaft Farbenindustrie Aktiengesellschaft (hereinafter sometimes referred to as I. G.), a corporation organized and existing under the laws of Germany with its office and principal place of business at Frankfurt am Main, Germany, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. I. G. is the largest corporation in Germany and is one of the largest chemical companies in the world.

9. Titangesellschaft, g.m.b.h., a company organized and existing under the laws of Germany with its office and principal place of business at Leverkusen, Germany, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Titangesellschaft was organized in 1927 by the defendant National and co-conspirators Titan A/S and I. G. pursuant to the conspiracy hereinafter alleged. Titangesellschaft is the largest producer of titanium compounds in Europe.

10. Societe Industrielle du Titane (hereinafter sometimes referred to as Societe Industrielle), a corporation organized and existing under the laws of France with its principal place of business at Paris, France, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. In 1922 Societe Industrielle entered into a contract with co-conspirator Titan A/S under which it received rights to manufacture titanium compounds in France, as is hereinafter more particularly described.

11. Imperial Chemical Industries, Ltd. (hereinafter sometimes referred to as I. C. I.), a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. I. C. I. was organized in 1926 by the amalgamation of the leading British chemical companies and is the largest manufacturer of chemicals in the British Empire, having total assets in excess of £100,000,000.

12. Goodlass Wall and Lead Industries, Ltd. (hereinafter sometimes referred to as Goodlass Wall), a corpora-

tion organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Goodlass Wall is the largest producer of lead and lead pigments in the British Empire.

13. Imperial Smelting Corporation (hereinafter sometimes referred to as I. S. C.), a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. I. S. C. is one of the largest producers of pigments in the British Empire.

7 14. British Titan Products, Ltd. (hereinafter sometimes referred to as British Titan), a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Billingham, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. British Titan was organized in 1933 by defendant Titan Inc. and co-conspirators I. C. I., Goodlass Wall and I. S. C., pursuant to the conspiracy herein alleged. British Titan is the largest manufacturer of titanium compounds in the British Empire.

15. National Titanium Pigments Ltd. (hereinafter sometimes referred to as Laporte), a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Luton, England, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Laporte is the only other producer of titanium compounds in the British Empire.

16. Canadian Industries, Ltd. (hereinafter sometimes referred to as C. I. L.), a corporation organized and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. C. I. L. is the largest chemical manufacturer in Canada and substantially all of its stock is owned in equal shares by defendant du Pont and co-conspirator I. C. I.

17. Canadian Titanium Pigments, Ltd. (hereinafter sometimes referred to as Canadian Titan), a corporation organized and existing under the laws of the Dominion of Canada with its office and principal place of business

at Montreal, Canada, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Canadian Titan was organized in 1937 pursuant to the conspiracy hereinafter alleged by defendant National and co-conspirator C. I. L. and approximately 49 per cent of its stock is owned by defendant National and the balance by co-conspirator C. I. L.

18. Kokusan Kogyo Kabushiki Kaisha (hereinafter sometimes referred to as Kokusan), an organization existing under the laws of Japan, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Kokusan is the largest manufacturer of paints in Japan. It is a subsidiary of Nippon Sangyo which is one of the largest industrial enterprises in Japan.

19. Titan Kogyo Kabushiki Kaisha (hereinafter sometimes referred to as Titan Kogyo), a company organized and existing under the laws of Japan with its office and principal place of business at Tokio, Japan, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Titan Kogyo was organized in 1936 by defendant Titan Inc. and co-conspirators I. G., Titangesellschaft, Terres Rares, and Thann & Mulhouse (said five companies being hereinafter sometimes collectively referred to as the European-American Group). Fifty per cent of the stock of co-conspirator Titan Kogyo is owned by co-conspirator Kokusan, 17½ per cent by defendant Titan Inc., 17½ per cent by co-conspirator I. G., and the remaining 15 per cent by co-conspirators Terres Rares and Thann & Mulhouse. Titan Kogyo is the largest manufacturer of titanium compounds in Japan.

20. Defendant Titan Inc. and co-conspirators I. G., Titangesellschaft, I. C. I., I. S. C., Goodlass Wall, British Titan, C. I. L., Canadian Titan, Kokusan, and Titan Kogyo are sometimes hereinafter collectively referred to as the Titan Companies, and defendant National and defendant du Pont, together with the Titan Companies, are sometimes hereinafter collectively referred to as the Allied Companies.

21. Societe de Produits Chimiques des Terres Rares (hereinafter sometimes referred to as Terres Rares), a corporation organized and existing under the laws of France, with its office and principal place of business at Paris, France, is not made a defendant here-

in but is named as a co-conspirator to the combination and conspiracy herein alleged. Terres Rares acquired the Blumenfeld patents for the manufacture of titanium compounds which are hereinafter referred to.

22. Fabriques de Produits Chimiques de Thann et de Mulhouse (hereinafter sometimes referred to as Thann & Mulhouse), a corporation organized and existing under the laws of France, with its office and principal place of business at Paris, France, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Both co-conspirators Thann & Mulhouse and Terres Rares are affiliated with the French chemical company of Saint Gobain, which is the second largest such company in France, with assets in excess of 500,000,000 francs. Co-conspirator Thann & Mulhouse is the largest manufacturer of titanium compounds in France.

23. Societa Anonima Titanium (hereinafter sometimes referred to as Montecatini), a corporation organized and existing under the laws of Italy, with its office and principal place of business at Milan, Italy, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Montecatini is the only manufacturer of titanium compounds in Italy and is a subsidiary of a company of that name which is the largest manufacturer of chemicals in Italy and which has a capital in excess of 2,000,000,000 lira.

24. Verein fur Chemische and Metallurgische Produktion Aussig (hereinafter sometimes referred to as Aussig), a corporation organized and existing under the laws of Czechoslovakia, with its office and principal place of business at Prague, Czechoslovakia, is not made a defendant herein but is named as a co-conspirator to the combination and conspiracy herein alleged. Aussig is the only manufacturer of titanium compounds in Czechoslovakia and is the largest chemical company in Central Europe.

25. Co-conspirators Aussig, Montecatini, Terres Rares, Thann & Mulhouse, and Laporte are hereinafter sometimes referred to collectively as the Blumenfeld Companies.

NATURE OF TRADE AND COMMERCE INVOLVED

26. Titanium is the ninth most abundant element on the earth's surface. The principal titaniferous ores are ilmenite and rutile. Titanium compounds have become of increasing commercial importance since the last war. Be-

cause of certain unique characteristics which titanium compounds possess, such as their opacity, great hiding power, and chemical inertness, they are today largely displacing other pigments such as lithopone and white lead. Although the industry is only a little over twenty years old, over 100,000 tons of pure titanium dioxide, having a value in excess of \$40,000,000, are produced and sold in the United States annually. The principal use of titanium compounds is for the manufacture of paints; although they are also largely used in the manufacture of rubber, glass, paper and vitreous enamels.

27. The earliest development work in the utilization of titanium compounds was carried on by two chemists, Barton and Rossi. As an outgrowth of their efforts, co-conspirator Titanium Pigment was incorporated in 1916. It acquired the Barton and Rossi patents and built a factory at Niagara Falls, New York, for the production of titanium compounds. This company was subsequently acquired by and became a part of defendant National.

28. At substantially the same time that Barton and Rossi were developing their process for the manufacture of titanium compounds in the United States, Gustav Jebesen and an associate were developing another process for the manufacture of titanium compounds in Norway.

11 To exploit their process, co-conspirator Titan A/S was organized under the laws of Norway and acquired the Jebesen patents.

29. Simultaneously with the development work of Barton and Rossi in the United States and Jebesen in Norway, a chemist by the name of Joseph Blumenfeld had also developed a patented process for the manufacture of titanium compounds in France. He transferred the patent rights covering his process to co-conspirator Terres Rares, which then proceeded to exploit these patents by a series of licensing agreements. Licenses under the Blumenfeld patents were granted to co-conspirators Thann & Mulhouse, Montecatini, Aussig, Laporte and Commercial Pigments.

30. A company known as Auergesellschaft had likewise developed a process for the manufacture of titanium compounds and had engaged in their manufacture in Germany in the early 1920's. Patent rights belonging to Auergesellschaft were subsequently acquired by co-conspirator Krebs and defendant du Pont.

31. All of the important patents obtained by Blumen-

feld, defendant Jebesen, Barton and Rossi, and Auergesellschaft had expired by 1936.

32. There are only four manufacturers of titanium compounds in the United States. The largest of these is defendant National, and its principal factories for manufacturing such compounds are located at St. Louis, Missouri, and Sayreville, New Jersey. Defendant National sells and ships the titanium compounds so made by it at these factories into all of the states of the United States, such sales and shipments being generally made directly to consumers of such products located throughout the country. Defendant National has exported some titanium compounds to South and Central America and to Canada, but because of the conspiracy hereinafter set forth has refrained from exporting any such compounds to any other country in the world.

12 33. Defendant du Pont is, next to defendant National, the largest manufacturer of titanium compounds in the United States. Its principal factory for the manufacture of such compounds is located at Newark, New Jersey, and defendant du Pont sells and ships titanium compounds made by it at said factory into all of the states of the United States. Similarly to defendant National, defendant du Pont follows the general policy of selling and shipping such compounds directly to consumers located throughout the country. Defendant du Pont, because of the conspiracy hereinafter alleged, has refrained from exporting titanium compounds from the United States, except to South and Central America.

34. The American Zirconium Company, a subsidiary of the Glidden Company of Cleveland, Ohio, also manufactures titanium compounds at a factory located at Baltimore, Maryland, from whence it sells and ships the titanium compounds made by it into all of the states of the United States. Pursuant to the conspiracy hereinafter alleged, defendants and co-conspirators have restrained the production and sale of titanium compounds by the American Zirconium Company in the manner hereinafter described.

35. The Virginia Chemical Company, a subsidiary of the Interchemical Company, also manufactures titanium compounds at a factory located at South River, Virginia, from whence it sells and ships titanium compounds made by it into all the states of the United States. Pursuant to the conspiracy hereinafter alleged, defendants and co-

conspirators have restrained the production and sale of titanium compounds by the Virginia Chemical Company in the manner hereinafter described.

36. Prior to the time when each of the defendants and co-conspirators joined in the conspiracy hereinafter alleged, each such defendant and co-conspirator was actively engaged in, or threatened to engage in, competition with the others in the manufacture and sale of titanium compounds. As each defendant or co-conspirator joined the conspiracy hereinafter alleged, all such competition has been eliminated.

37. The corporate defendants and co-conspirators include all the important manufacturers of titanium compounds in the world. They manufacture and sell in excess of 90 per cent of such compounds manufactured and sold in the United States, and manufacture and sell a similar proportion in all other important markets of the world. Throughout the period of time covered by the conspiracy, they have possessed the power, by concerted action, to eliminate competition in the manufacture and sale of titanium compounds in all markets of the world. In addition to acquiring all patents covering the Barton and Rossi process, the Jebesen process, the Auergesellschaft process in all countries, and the United States patents covering the Blumenfeld process, the Allied Companies have taken out and purchased numerous patents relating to the manufacture and sale of titanium compounds, and throughout the period covered by the conspiracy have owned substantially all patents of commercial importance relating to the manufacture and sale of such compounds and by pooling such patents have possessed the power, by concerted action, to prevent persons other than themselves from engaging in the manufacture and sale of titanium compounds in the United States.

COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE AND
COMMERCE AMONG THE SEVERAL STATES AND WITH
FOREIGN NATIONS

38. Beginning on or about July 30, 1920, defendant National and co-conspirator Titan A/S, and the remaining defendants and co-conspirators, and others to plaintiff unknown, on various dates thereafter, continuing at all times thereafter to the date of the filing of this complaint, have been continuously engaged in a combination by the means and methods hereinafter set forth, in restraint of, and to monopolize, the aforesaid trade

and commerce in titanium compounds among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements, and understandings in restraint of such trade and commerce, all in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Antitrust Act. Such combination and conspiracy and such unlawful contracts, agreements, arrangements and understandings is continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

39. Said unlawful combination and conspiracy has consisted of a continuing agreement and concert of action among all the defendants and co-conspirators, the terms of which have been that—

(a) The United States market was to be allocated to defendants National and du Pont as their exclusive territory for the manufacture and sale of titanium compounds;

(b) The markets of the world outside of the United States were to be allocated among defendants and co-conspirators by reserving certain markets as the exclusive territory for the manufacture and sale of titanium compounds to some of them, and by fixing quotas which certain of them were to be permitted to sell in other markets;

(c) Defendants National and du Pont and customers purchasing from them were not to export titanium compounds from the United States except to South and Central America;

15. (d) Domestic manufacturers other than defendants National and du Pont were to be prevented from exporting titanium compounds from the United States;

(e) The foreign co-conspirators and customers purchasing from them were not to import titanium compounds into the United States;

(f) The foreign co-conspirators were not to manufacture and sell titanium compounds in the United States;

(g) The foreign co-conspirators were not to license under their patents any persons, except defendants National and du Pont, to manufacture and sell titanium compounds in the United States;

(h) All persons were to be prevented from engaging in the manufacture and sale of titanium compounds in

the United States, except, with the consent of defendants National and du Pont;

(i) All present and future patents, owned or to be acquired by the defendants and the other Allied Companies, relating to the manufacture and sale of titanium compounds were to be pooled in such manner that defendants National and du Pont would receive licenses exclusive of all others under all such United States patents, present and future, owned by the Titan Companies; each Allied Company would grant to each Titan Company an exclusive license under all such patents, present and future, owned or to be acquired by such Allied Company for use in the territory allocated to such Titan Company; defendant National would grant to defendant du Pont a license exclusive of all others except defendant National under all such

United States patents, present and future, owned
16 or to be acquired by National; and defendant du Pont would grant to defendant National a license exclusive of all others except defendant du Pont under all such United States patents, present and future, owned or to be acquired, by defendant du Pont.

Said unlawful combination and conspiracy was formed and carried into effect principally by means of the several contracts, agreements, understandings and acts alleged in paragraphs 40 through 76 hereof, all of which were made and have been carried out by defendants and co-conspirators as a part of said combination and conspiracy.

40. On or about July 30, 1920, co-conspirators Titanium Pigment and Titan A/S entered into a written contract (sometimes referred to herein as the Contract of 1920), which is now in effect and cannot be terminated until 1956. Said contract provides as follows:

(a) Titanium Pigment was assigned the territory of North America, and Titan A/S was given the rest of the world, with the exception of South America, which was to be common territory;

(b) Titanium Pigment granted to Titan A/S for Titan A/S territory a license exclusive of all others, including Titanium Pigment, to manufacture and sell titanium compounds under all patents then owned or which might thereafter be acquired by it, or which might be at its disposal. Similarly, Titan A/S granted Titanium Pigment for Titanium Pigment's territory, a license exclusive of all others, including Titan A/S, to manufacture and sell titanium compounds under all patents then owned or which

might thereafter be acquired by it, or which might be at its disposal. Each company agreed to grant the other non-exclusive licenses under such patents for the territory of South America;

17 (c) Each party agreed that it would not ship titanium compounds into the other's territory without the other's consent;

(d) Each party agreed to present the importation into the other party's territory of finished articles, that is, manufactured articles, such as paint, glass, and rubber, utilizing any titanium compound as one of the raw materials for the manufacture thereof, if the importation of such finished articles interfered in any way with sales of titanium compounds by the other party in its own territory;

(e) Each party was allowed to grant sub-licenses. The contract, however, recited that neither party could grant licenses, either under its own patents or under any patents licensed to it under the Contract of 1920, unless the licensee or sub-licensee agreed to grant to the other party to the Contract of 1920 an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture of titanium compounds for the territory of such other party, and unless such licensor compelled the licensee or sub-licensee to agree to all of the territory restrictions of the Contract of 1920, referred to in sub-paragraphs (a) through (d) hereof;

(f) The agreement was to last until 1936, and was automatically renewable for periods of ten years thereafter, with the right of either party to cancel by giving notice five years before the expiration of any ten-year period.

18 41. Simultaneously with the execution of the Contract of 1920, defendant National entered into a written contract with co-conspirators Titanium Pigment and Titan A/S. Under its provisions defendant National agreed to respect the Contract of 1920, and further agreed to assign promptly to Titanium Pigment all patents, inventions, and improvements relating to titanium compounds which it then owned or might thereafter acquire, or which should ever be at its disposal, throughout the world.

42. On or about May 1, 1925, co-conspirator Titan A/S entered into a written contract with co-conspirator Societe Industrielle, under which it granted Societe Industrielle a sub-license for the manufacture of titanium compounds

under and subject to the provisions of the Contract of 1920. The contract so entered into is now in effect and cannot be terminated until it provides as follows:

(a) Societe Industrielle was granted the territory of France, including all of its colonies and possessions, except those appurtenant to the territories of North and South America. Titan A/S was assigned the rest of the world;

(b) Titan A/S granted to Societe Industrielle for its territory a license exclusive of all others, including Titan A/S, to manufacture and sell titanium compounds under all patents, methods, and experience then owned or which might thereafter be acquired by Titan A/S, or which should ever be at its disposal. Similarly, Societe Industrielle granted Titan A/S for Titan A/S territory a license exclusive of all others, including Societe Industrielle, to manufacture and sell titanium compounds under all patents, methods, and experience then owned or which might thereafter be acquired by Societe Industrielle, or which should be at its disposal;

19 (c) Each party agreed not to export titanium compounds into the other's territory without the other's consent, and agree to impose the same obligation upon its customers;

(d) Each party agreed not to export into the other's territory finished articles manufactured by it, and further agreed to prevent such importation by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory;

(e) Each party was allowed to grant sub-licenses. The contract, however, provided that neither party could grant licenses under its own patents or under any patents licensed to it under the contract, unless the licensee or sub-licensee agreed to grant to the other party to the contract an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture of titanium compounds for the territory of such other party, and unless such licensor party compelled the licensee or sub-licensee to agree to all of the territorial restrictions of the contract referred to in sub-paragraphs (a) through (d) hereof. In case Societe Industrielle wished to grant licenses under its patents or under any patents licensed to it by the contract, it was required to obtain the permission of Titan A/S;

(f) The Contract was to last until 1941, and was automatically renewable for ten year periods, with the right of either party to cancel by giving notice six years before the expiration of any ten-year period..

43. Some time in the year 1927, defendant National purchased approximately 87 per cent of the stock of co-conspirator Titan A/S, and also acquired a controlling interest in co-conspirator Societe Industrielle. In 1932

20 defendant National acquired all of the stock of co-conspirator Titanium Pigment, and in 1936 acquired all of its assets, assumed all of its obligations, and thereafter directly operated the business of manufacturing and selling titanium compounds which had been conducted by Titanium Pigment.

44. Upon defendant National's acquiring the controlling interest in co-conspirator Titan A/S, defendant National and co-conspirator Titan A/S agreed to utilize Titan A/S and the Contract of 1920 to further control competition in the manufacture and sale of titanium compounds in all markets of the world, including the United States. Said defendants and co-conspirator agreed to have Titan A/S (and subsequently defendant Titan Inc.) form in each of the important industrial countries of the world, in association with any corporation or firm contemplating the manufacture and sale of titanium compounds and threatening to be a serious competitor of National and Titan A/S, new companies in which National or Titan A/S were to have a part interest. Any new company so formed was to be given certain territory in which it would have the exclusive right to manufacture and sell titanium compounds; National was to agree not to export into such territory, and the new company so organized was to refrain from exporting into National's territory (consisting of the United States and the other countries of North America) or into the territory of any other company associated with National. The contracts providing for the formation of the new companies were to be made by Titan A/S (and subsequently defendant Titan Inc.), and defendant National was to be bound to adhere to all of the territorial restrictions placed on Titan Inc. in such contracts by virtue of the Contract of 1920. All the patents, present and future belonging to National or Titan A/S, or any of the companies associated with either in the formation of such new companies, as well as those of the new companies to be organized, were to be licensed exclusively to National for North America, to the New companies to be organized

for their respective territories, and to Titan A/S for the balance of the world.

21 45. Prior to 1927 co-conspirator I.G. conducted extensive development work preparatory to engaging in the manufacture and sale of titanium compounds. Defendant National believed that co-conspirator I.G., because of its inventive power and great resources, would develop into a serious competitor of defendant National, not only in Germany but in all markets of the world. In order to eliminate the competition which National expected would develop between itself and I.G. throughout the world, defendant National and co-conspirator Titan A/S entered into negotiations with I.G. and some time in 1927, agreed with I.G. to form a new company, co-conspirator Titangesellschaft, which was to be given the countries of Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Roumania, Serbia, Croatia, Slovenia, Bulgaria, Greece, Turkey, Japan, China, and Spain, as its exclusive territory for the manufacture and sale of titanium compounds. Thereupon, defendant National (acting through Titan A/S), I.G., and Titangesellschaft entered into nine separate contracts which provided for the organization of Titangesellschaft and the control of its activities. These nine separate contracts, provided among other things that:

(a) Titangesellschaft was to be owned jointly by Titan A/S and I.G.;

(b) I.G. would not conduct any operations relating to the manufacture and sale of titanium compounds except through co-conspirator Titangesellschaft, and Titan A/S would not conduct any such operations in Titangesellschaft's territory except through Titangesellschaft;

(c) Titangesellschaft would confine all its manufacturing and selling operations to the countries listed above;

(d) I.G. agreed to grant an exclusive license to Titangesellschaft under all patents then owned or which might be subsequently acquired by I.G., or which should be at its disposal, relating to the manufacture and sale of titanium compounds;

22 (e) Titan A/S was given the right to require Titangesellschaft to furnish Titan A/S with 50 per cent of the titanium compounds produced by Titangesellschaft at cost, which compounds, however, could only be sold outside of Titangesellschaft's territory;

(f) Titan A/S would enter into a written contract with

Titangesellschaft under which it would grant Titangesellschaft a sub-license for the manufacture and sale of titanium compounds under and subject to the provisions of the Contract of 1920. Such licensing contract which was entered into and is now in force provided as follows:

(1) Titangesellschaft was assigned the countries listed above, and Titan A/S was assigned the rest of the world;

(2) Titan A/S granted Titangesellschaft for Titangesellschaft's territory an exclusive license to manufacture and sell titanium compounds under all patents, methods, and experience then owned or which thereafter might be acquired by Titan A/S, or which should thereafter be at its disposal. Similarly, Titangesellschaft granted Titan A/S for Titan A/S territory an exclusive license to manufacture and sell titanium compounds under all patents, methods, and experience then owned or which might thereafter be acquired by Titangesellschaft, or which should thereafter be at its disposal;

(3) Each party agreed that it would not ship titanium compounds into the other's territory without the other's consent, and agreed to impose the same obligation upon its customers;

23 (4) Each party agreed not to import into the other's territory finished articles manufactured by it, and further agreed to prevent such importation by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory;

(5) Each party was allowed to grant sub-licenses. The contract, however, provided that neither party could grant licenses, under its own patents or under any patents licensed to it under the contract, unless the licensee or sub-licensee agreed to grant to the other party to the contract an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture and sale of titanium compounds for the territory of such other party, and unless such licensor compelled the licensee or sub-licensee to agree to all of the territorial restrictions of the contract referred to in subparagraphs (1) through (4) hereof;

(6) The contract was to last until 1957, and was to be automatically renewable for ten-year periods.

46. After the outbreak of the present war in 1939, defendants National and Titan Inc. and co-conspirator

Titangesellschaft believed that eventually the United States would be at war with Germany, and that after the outbreak of war the United States patents owned by Titangesellschaft under which defendants National and du Pont were licensed in this country would be seized by the Alien Property Custodian, and the German patents owned by defendant Titan Inc. under which co-conspirator Titangesellschaft was licensed in Germany would similarly be seized by the corresponding official in Germany.

24 They also believed that the patents if seized in the two countries would be licensed to others, and that this would lead to competition from others in their respective markets. Consequently, defendants National and Titan Inc. and co-conspirators Titangesellschaft and I. G. decided to amend the various licensing contracts existing between Titan Inc. (successor to Titan A/S), Titangesellschaft, and I. G., by providing that all of the United States patents owned by Titangesellschaft should be transferred to defendant Titan Inc., and the German patents owned by defendant Titan Inc. should be transferred to co-conspirator Titangesellschaft. The parties thereupon amended the several contracts referred to in Paragraph 45, to provide for an assignment of patents, instead of exclusive licenses, in their respective countries, but stipulated that none of the other provisions in the several contracts referred to were to be affected in any way and the same now remain in effect. Thereafter Titangesellschaft assigned to defendant Titan Inc. all of its United States patents, and defendant Titan Inc. endeavored to transfer all of its German patents to Titangesellschaft.

47. After the execution of the contracts between co-conspirators Titan A/S, I. G., and Titangesellschaft, referred to in Paragraph 45, Titangesellschaft erected a factory for the manufacture of titanium compounds adjacent to I. G.'s factories at Leverkusen, Germany, and Titangesellschaft thereupon became the largest manufacturer of titanium compounds in Europe. Titan A/S discontinued its manufacturing operations in Norway and thereafter purchased all of its requirements of titanium compounds from co-conspirator Titangesellschaft and sold them in the territory reserved to it.

48. Some time in 1929, defendant National organized defendant Titan Inc. under the laws of the State of Delaware, and transferred to it all of the patents and licensing rights then owned by co-conspirator Titan A/S, as well

25 as the stock interest then owned by defendant National and Titan A/S in co-conspirators Societe Industrielle and Titangesellschaft. Defendant Titan Inc. thereupon assumed all of the obligations of Titan A/S under the Contract of 1920, and under all other contracts theretofore entered into by Titan A/S. Thereafter, Titan A/S continued to function as a selling agency for defendant Titan Inc. in part of the territory reserved from time to time to Titan Inc.

49. Some time in 1933, the German corporation known as Sachtleben, affiliated with Metallgesellschaft, a very large German industrial company, informed co-conspirator I. G. that it was going to undertake the manufacture and sale of titanium compounds. To avoid competition in the various markets of the world and as part of the conspiracy herein alleged, defendants National and Titan Inc. and co-conspirator I. G., acting through co-conspirator Titangesellschaft, entered into a contract with Sachtleben, by the terms of which Sachtleben agreed to refrain from manufacturing and selling titanium compounds, and in consideration therefor Titangesellschaft agreed to pay to Sachtleben a sum of money each year during the existence of such agreement. As a result, Sachtleben refrained from manufacturing and selling titanium compounds.

26 50. By 1933 co-conspirator I. C. I., Goodlass Wall, and I. S. C. were planning to engage in the manufacture of titanium compounds in Great Britain. I. C. I. had begun work to develop a process of its own, and co-conspirator Laporte had approached I. S. C. and Goodlass with a view to forming a joint company for the manufacture and sale of titanium compounds. Defendants National and Titan Inc. believed the aforesaid co-conspirators I. C. I., I. S. C., and Goodlass Wall would develop into serious competitors of defendant National, not only in the British Empire but in all the markets of the world. Consequently, in order to eliminate the competition which they expected would develop between themselves and the aforesaid co-conspirators throughout the world, and to keep control of the manufacture and sale of titanium compounds within the British Empire, defendants National and Titan Inc. entered into negotiations with the aforesaid co-conspirators, and some time in 1933 all the parties came to an agreement and entered into a series of written contracts, which provided for the formation of a new company, co-conspirator British Titan, which was to

have the exclusive right to manufacture and sell titanium compounds in the British Empire, except those parts thereof which are appurtenant to North or South America. These contracts so entered into, which are still in effect, provided:

(a) Defendant Titan Inc. was to own 49 per cent of British Titan, and I. C. I., I. S. C., and Goodlass Wall were to own the remaining 51 per cent in equal shares;

(b) Defendants National and Titan Inc. agreed that they would not conduct any operations relating to the manufacture and sale of titanium compounds within the British Empire except through co-conspirators British Titan; and co-conspirators I. C. I., I. S. C., and Goodlass

Wall agreed that they would not conduct any operations relating to such manufacture and sale in any place in the world except through British Titan.

Co-conspirator British Titan was to confine all its operations relating to the manufacture and sale of titanium compounds to the British Empire, except those parts thereof which are appurtenant to North or South America;

(c) I. C. I., I. S. C., and Goodlass Wall agreed to transfer to co-conspirator British Titan all their patents, present and future, relating to the manufacture and sale of titanium compounds;

(d) Defendant Titan Inc. executed a written contract with British Titan under which it granted British Titan a sub-license for the manufacture and sale of titanium compounds under and subject to the provisions of the Contract of 1920. Said licensing contract, which is now in effect, provided as follows:

(1) British Titan was assigned the British Empire as its exclusive territory, except those parts thereof appurtenant to North and South America, and defendant Titan Inc. was assigned the rest of the world;

(2) Defendant Titan Inc. granted to British Titan for British Titan's territory an exclusive license under all patents and processes then owned or which might thereafter be acquired by defendant Titan Inc. or which should be at its disposal, relating to the manufacture and sale of titanium compounds. Similarly, British Titan granted defendant Titan Inc. for Titan Inc.'s territory an exclusive license to manufacture and sell titanium compounds under all patents and processes then owned or which might thereafter be acquired by British Titan, or which should be at its disposal;

(3) Each party agreed that it would not export titanium compounds into the other's territory without the other's consent, and further agreed to impose the same obligation upon its customers;

(4) Each party agreed not to import into the other's territory finished articles manufactured by it, and further agreed to prevent such importation by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory;

(5) Each party was allowed to grant sub-licenses. The contract, however, provided that neither party could grant licenses, under its own patents or under any patents licensed to it under the contract, unless the licensee or sub-licensee agreed to grant to the other party to the contract an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture and sale of titanium compounds for the territory of such other party, and unless such licensor compelled the licensee or sub-licensee to agree to all of the territorial restrictions of the contract referred to in sub-paragraphs (1) through (4) hereof;

(6) The contract was to last until 1963, and was to continue in force thereafter until canceled by either party to the contract upon twelve months' notice.

20 51. Upon the execution of the aforesaid contracts between defendant Titan Inc. and co-conspirators I.C.I., I.S.C., Goodlass Wall, and British Titan, defendant Titan Inc. turned over to British Titan all of its business in the British Empire, and British Titan erected a factory for the manufacture of titanium compounds at Billingham, England. British Titan thereupon became the largest manufacturer of titanium compounds in the British Empire.

52. Some time prior to 1930, defendants National and Titan Inc. and co-conspirator Titangesellschaft found that the various Blumenfeld Companies and Commercial Pigments (subsequently acquired by defendant du Pont) were competing with them in the various markets of the world in the manufacture and sale of titanium compounds. Defendants National and Titan Inc. thereupon began negotiations with the various Blumenfeld Companies and with Commercial Pigments, which at that time was manufacturing titanium pigments in the United States under a

license from Blumenfeld, in an effort to eliminate such competition in all the markets of the world. The parties to these negotiations recognized that no agreement eliminating competition in the various European markets could be reached unless a similar agreement was made between defendant National and Commercial Pigments in the United States. Consequently, negotiations designed to eliminate competition in the various European markets proceeded simultaneously with negotiations between defendant National and Commercial Pigments in the United States. The European negotiations were conducted by Titangesellschaft and Gustav Jebesen on behalf of defendants National and Titan Inc., pursuant to instructions given them by defendant National. The negotiations on behalf of the Blumenfeld Companies in Europe were conducted chiefly by Blumenfeld himself. The negotiations in the United States on behalf of defendant National in its efforts to promote a world-wide understanding eliminating competition in all the markets of the world were conducted chiefly by its former Vice President McCarthy, and on behalf of Commercial Pigments by its officers, Tichnor and Chase.

30 53. Some time in 1931 co-conspirator Krebs purchased all of the assets and manufacturing facilities of Commercial Pigments, which thereupon ceased business, and Krebs continued the titanium business of Commercial Pigments. Krebs at the same time acquired from Commercial Pigments all of the United States patents taken out by Blumenfeld covering his process. Thereupon Krebs was substituted for Commercial Pigments in the above negotiations. Defendant National and Krebs continued negotiations in an effort to reach a world-wide agreement which would eliminate competition in the manufacture and sale of titanium compounds, and which would give control and domination of the manufacture and sale of titanium compounds in the United States to defendants National and du Pont. From time to time thereafter throughout the years 1931, 1932, and 1933, defendant National, represented by Fletcher W. Rockwell and other officers of National, and defendant du Pont, represented by Carl H. Rupperecht and by Chase and Tichnor, who were at that time officers of Krebs, continued negotiations for the purpose of reaching an understanding of the nature above described. During the same period, Gustav Jebesen and officials of Titangesellschaft held similar meet-

ings with Blumenfeld and other representatives of the Blumenfeld Companies abroad. Jebesen and Blumenfeld kept defendants National and du Pont fully informed of the progress of their negotiations abroad, and they in turn were informed of the progress of the negotiations in this country.

54. Defendants National and du Pont wished at that time to pool all of their patents in this country in order to control and dominate the manufacture and sale of titanium compounds and to eliminate competition in the United States. The Contract of 1920, however, prohibited defendant National from issuing licenses under its own patents, or issuing sub-licenses under any patents licensed to it relating to the manufacture and sale of titanium compounds, unless the licensee or sub-licensee complied

31 with all of the territorial restrictions of said contract, and unless such licensee or sub licensee agreed to give to the various Titan Companies an exclusive license under its patents for the respective territories of the various Titan Companies. Defendant du Pont was unwilling to execute a written contract agreeing to comply with the provisions of the Contract of 1920, because such an agreement would be in violation of the antitrust laws. Consequently, defendants National and du Pont decided to employ a written contract, not embodying the full understanding of the parties, and to enter into an oral understanding containing the provisions which they believed were unlawful.

Thereupon defendants National and du Pont, through their respective subsidiaries, Titanium Pigment and Krebs, did, subject to said oral understanding and subject to the consent and approval of the Titan Companies, as hereinafter further described, execute a written contract dated January 1, 1933, but which was actually executed and put into effect some months later. Said written contract provided:

(a) Titanium Pigment and Krebs granted each other a non-exclusive license under all their patents, processes, methods, and apparatus relating to the manufacture and sale of titanium compounds, whether patented or unpatented, which it then owned or should thereafter acquire in the future, and the right to sell the products resulting from the use of such processes, methods, and apparatus in the United States, Mexico and Central and South America;

(b) Each party agreed to disclose to each other full

technical information with respect to the methods, processes, apparatus, and products licensed pursuant to the contract;

32 (c) Each party agreed to use its best efforts to assist the other to acquire a license to manufacture, use, and sell under any such United States patents owned by other companies under which such party itself was licensed. Co-conspirator Krebs further agreed to offer to any foreign associate of Titanium Pigment the opportunity to acquire a non-exclusive license under any patent issued in any European country or in Great Britain, which might be owned or otherwise be at the disposal of Krebs;

(d) The agreement was to be perpetual in duration, but could be terminated by either party by three years' notice, but such termination was not to affect or impair the licenses theretofore acquired by either party from the other;

55. Prior to the execution of the aforesaid contract in 1933, defendants du Pont and National had arrived at a separate oral understanding, which was not embodied in the terms of the aforesaid written contract. At that time Carl H. Rupprecht, acting on behalf of Krebs, and defendant du Pont orally agreed with Beschorman, a vice president of defendant National, that neither Krebs nor defendant du Pont would export any titanium compounds outside of the United States except to South and Central America, and further agreed that whereas the written contract recited that the licenses to be granted by Titanium Pigment to co-conspirator Krebs and by co-conspirator Krebs to Titanium Pigment were non-exclusive, such licenses were to be exclusive in fact.

By the terms of the contracts with the Titan Companies herein above referred to, National was prevented from licensing du Pont under said contract of 1933, either under National's own patents or under those of the Titan Companies. Accordingly, with the full knowledge and approval of du Pont, National submitted said contract
33 of 1933 and the aforesaid oral understanding to British Titan, Societe Industrielle Titangesellschaft, and I.G. for their consent to, and approval of, the execution of said contract as amplified by the aforesaid oral understanding. The said Titan Companies and I.G. gave their consent and approval to the execution of the said 1933 contract and oral understanding as carrying out in

substance the provisions of the Contract of 1920, and accordingly an agreement between all of the said parties was reached on that basis.

56. Some time in the year 1936, defendant du Pont acquired all of the assets of co-conspirator Krebs and assumed all of its obligations, including the written contract above referred to in Paragraph 54, as well as all the obligations under the oral understandings referred to in the previous paragraph, and has at all times since observed the same.

57. At the time defendants du Pont and National entered into the oral understanding referred to in Paragraph 55 hereof, it was understood that defendant du Pont would grant to defendant Titan Inc. and each of the other Titan Companies an exclusive license under all patents relating to the manufacture and sale of titanium compounds then owned by Krebs or du Pont, or which they should thereafter acquire, or should ever have at their disposal. There was, however, some delay in carrying out this provision of the understanding, because defendant du Pont believed it might be obligated to transfer to the various Blumenthal Companies all of its European patents, and consequently du Pont first endeavored to terminate any such obligation.

58. Beginning with the year 1937, and each year thereafter, defendant du Pont and Titan Inc. entered into contracts for the exchange of patent rights under the terms of which defendant du Pont has granted to defendant Titan Inc. exclusive licenses, with the right to grant sub-licenses, to each of the Titan Companies under defendant du Pont's patents relating to the manufacture and sale of titanium compounds for all countries, except North and South America. In all of these contracts, defendant du Pont has reserved operating rights, and such provision has been inserted by defendant du Pont for the sole purpose of making such contracts appear to be legal on their face. This provision was not intended to have any practical effect, as will be hereinafter more fully set forth. In these several patent exchange contracts, defendant Titan Inc. with the consent of defendant National, has granted du Pont a license under the patents which defendant Titan Inc. then owned or under which it had a right to issue sub-licenses.

59. On or about June 1938, defendant du Pont, represented by Carl H. Rupprecht, and defendants National

and Titan Inc., represented by Gustav Jebesen, and other officials of defendants National and Titan Inc., entered into a detailed oral understanding providing for the exchange of licenses between defendants Titan Inc. and du Pont. This oral understanding, which has remained in full force and effect, provided as follows:

(a) Defendant Titan Inc. agreed on behalf of itself and the other Titan Companies to restrict its operations relating to the manufacture and sale of titanium compounds to the territory outside of North America, and further agreed that the Titan Companies would not export to North America except with the permission of defendant National. Defendant du Pont agreed that it would confine all of its operations, in connection with the manufacture and sale of titanium compounds, within the United States and Central and South America, and it further agreed to prevent its customers from exporting titanium compounds outside of said territory. Defendant du Pont agreed to give, at defendant Titan Inc.'s request, 35 exclusive licenses to manufacture, use, and sell under all patents which it then owned or might thereafter acquire relating to the manufacture and sale of titanium compounds for the territories in which defendant Titan Inc. operated, with the exception of Central and South America. Defendant Titan Inc. was also given the right to grant sub-licenses to co-conspirators Titangesellschaft, British Titan, Societe Industrielle, Titan Kogyo, and Titan A/S, and any other company licensed by Titan Inc. in the future. Defendant Titan Inc. agreed to give to defendant du Pont, at defendant du Pont's request, a non-exclusive license to manufacture, use, and sell under any United States patents which it then owned or might subsequently acquire, or under which it should have the right to an exclusive license, with the right to use and sell in Central and South America. The understanding further provided that in all the licenses granted by defendant du Pont to defendant Titan Inc. or to any of the other Titan Companies a reservation of a non-exclusive license to defendant du Pont would be inserted in the written contracts granting such licenses, but this reservation was to be of a formal nature and was to have no practical importance and would never be—and it has in fact never been—exercised by defendant du Pont. The oral understanding was to last indefinitely and could only be terminated by three years' notice given by either party.

It was, however, provided that any license granted prior to the termination of the understanding was irrevocable;

(b) The above understanding was subject to approval by co-conspirators British Titan, Titangesellschaft, and Societe Industrielle;

36 (c) Shortly thereafter, co-conspirators Titangesellschaft, British Titan, and Societe Industrielle consented to the above understanding.

60. On or about January 1, 1941, the written contract of 1933 between co-conspirators Titanium Pigment and Krebs (subsequently assumed by defendants National and du Pont, respectively) was amended by a supplemental contract entered into between defendants National and du Pont which provided for a discontinuance of the exchange of technical information, but which confirmed in all respects the obligations of the written contract and the various oral understandings above referred to, and the same now remain in effect.

61. By virtue of said written contract of 1933, as amended, and the various oral understandings above referred to, defendant du Pont has in fact subscribed to said Contract of 1920, and is and was entitled to receive all of its benefits, to wit, an agreement on the part of defendant Titan Inc. and all of the other Titan Companies to refrain from exporting into the United States, and to receive a license under all the patents, present and future, belonging to any of the Titan Companies relating to the manufacture and sale of titanium compounds, and defendant du Pont in turn has assumed the obligations of said Contract of 1920, to wit, not to export from the United States except to South and Central America, and to grant to defendant Titan Inc. and the other Titan Companies, for their respective territories, an exclusive license under all of its patents, present and future, relating to the manufacture and sale of titanium compounds.

62. It was one of the purposes of defendants du Pont, Titan Inc., and National in pooling their patents in the manner hereinbefore described to utilize the United States patents so pooled to prevent any person, other than said defendants, from engaging in the manufacture and sale of titanium compounds in the United States, except with the consent of and under terms approved by defendants
37 du Pont and National. In or about the year 1934, a company known as the American Zirconium Company (hereinafter sometimes referred to as Zirconium), erected a factory at Baltimore, Maryland, for the manu-

facture and sale of titanium compounds. Zirconium at that time was owned 50 per cent by the Glidden Company of Cleveland, Ohio and 50 per cent by the Metal and Thermit Corporation of New York City. Said 50 per cent stock interest of Metal and Thermit had been issued in exchange for patents which it possessed for the manufacture of such compounds. As soon as Zirconium started manufacturing operations, defendants du Pont and National agreed that they would use the threat of infringement suits to be brought by defendants du Pont and National to compel Zirconium to accept a license agreement or license agreements from defendants du Pont and National, which would so control the manufacturing and selling activities of Zirconium relating to titanium compounds as to prevent it from becoming a competitor of defendants du Pont and National. Both defendants National and du Pont thereupon notified Zirconium that it was infringing their patents, and as a result Zirconium accepted a license from defendant National and one from defendant du Pont. Both du Pont and National agreed on the terms of the license agreements which they separately granted Zirconium.

63. Under the license from defendant du Pont, Zirconium received a license under certain United States patents relating to the manufacture and sale of titanium compounds, which restricted the amount of such compounds that could be manufactured by Zirconium to 3,000 tons a year for the three years beginning with 1935, 6,000 tons a year for six years beginning with 1938, and 9,000 tons a year for the balance of the term of the agreement, which ran until the expiration of all of the patents in 1951. Zirconium agreed to pay defendant du Pont a royalty equal to two per cent of the selling price of all titanium compounds produced by Zirconium.

Under the license from defendant National, its subsidiary Titanium Pigment granted Zirconium a non-exclusive license under all patents then owned or to be subsequently acquired by Titanium Pigment during the life of the license agreement which ran until 1951. Zirconium in turn agreed to grant a non-exclusive license to Titanium Pigment under all of its patents then owned or to be subsequently acquired by it, and an exclusive license to defendant Titan Inc. and the other Titan Companies for their respective territories. Zirconium also agreed not to export titanium compounds from the United States, and also to prevent the exportation of

finished articles into the territory of any of the Titan Companies, if the importation of such finished articles interfered in any way with the sales of titanium compounds by any of the Titan Companies in its territory. In lieu of paying royalties, Zirconium agreed to issue, and did issue, to defendant National 10 per cent of the stock of Zirconium, and thereafter defendant National elected an officer of defendant National to be a director of Zirconium.

64. Some time prior to 1937, the Virginia Chemical Company erected a factory for the production of titanium compounds, and thereafter manufactured and sold such compounds. Defendants National and du Pont thereupon agreed that they would utilize the threat of infringement proceedings to compel Virginia Chemical to accept a license, which would so control the operations of Virginia Chemical as to prevent it from becoming a competitor of defendants National and du Pont. They thereupon notified Virginia Chemical that it was infringing patents of defendants du Pont and National, and as a result Virginia Chemical some time in 1937 accepted a license from defendant du Pont under certain United States patents relating to the manufacture and sale of titanium compounds, which restricted the amount of titanium compounds that could be produced by Virginia Chemical to 3,000 tons for three years commencing with October 1, 1937, 6,000 tons for the next six years, and 9,000 tons during the remainder of the license period, which was at least until 1953.

Before du Pont granted the aforesaid license, it secured the approval of National to the terms of the license to be granted Virginia Chemical. Negotiations for a license from National to Virginia Chemical have continued from 1937, but have not been consummated in the grant of a license.

65. At the time defendants National and du Pont entered into their written contract and the oral understandings in 1933, described above, negotiations were proceeding in Europe between Titan Inc. and the other Titan Companies and the various Blumenfeld Companies for the purpose of eliminating competition between the Blumenfeld Companies and defendants National, Titan Inc., and the other Titan Companies in all markets of the world, as hereinabove described. After the conclusion of the arrangements between defendants National and du Pont in 1933, defendant du Pont continued to assist defendants National and Titan Inc. in fostering and promoting an

agreement among all the European producers in order to eliminate competition between defendants National, du Pont, and the various Titan Companies on the one hand, and the Blumenfeld Companies on the other hand, in all the markets of the world. To induce the Blumenfeld Companies to enter into a convention with the Titan Companies, defendants National and du Pont agreed with the Blumenfeld Companies not to export any titanium compounds outside of the United States except to South and Central America, and the various Blumenfeld Companies in turn agreed not to export any titanium compounds to North America. As part of the conspiracy herein alleged, defendant Titan Inc. and the other Titan Companies, having first secured the approval of defendants National and du Pont, thereupon entered into four separate contracts with the Blumenfeld Companies for the purpose of eliminating competition.

66. The first of these was a contract between co-conspirators Titangesellschaft and Aussig dated November 10, 1933. The territory covered by this contract was Germany, Czechoslovakia, Poland, Austria, Hungary, Yugoslavia, Roumania, and Russia. Under the terms of the contract, Aussig was allotted between 25 and 28 40 per cent of all sales of titanium compounds made in this territory, and co-conspirator Titangesellschaft was granted the remainder. Both parties agreed to prevent titanium compounds from being imported into this territory by third parties, and Titangesellschaft and I. G. agreed that they would not lend any assistance, technical or commercial, to any person who delivered titanium compounds into said territory. Provisions for the determination of prices of titanium compounds sold by the parties in this territory were likewise inserted. To prevent Aussig from expanding its productive facilities, it was provided that Aussig should purchase all of its requirements of titanium compounds in excess of its then capacity from Titangesellschaft. The contract was to continue in existence until December 31, 1938, and was to be renewed for two-year periods thereafter.

67. Another of the four contracts referred to in paragraph 65, termed by the parties thereto as the Contrat a Six, is dated June 1935, but was actually in effect for at least a year prior thereto. The parties to this contract were defendant Titan Inc. and co-conspirators Titangesellschaft, Societe Industrielle, Thann & Mulhouse, Terres Rares, and Montecatini. This contract applied to all the

countries of the world with the exception of North America and the British Empire. Each party renounced any rights in the territory of the other and agreed to impose the same obligation on its customers, and exclusive rights for the sale and delivery of titanium compounds were allocated among the parties to the contract on the basis hereinafter set forth:

(a) Co-conspirators Titangesellschaft and Aussig were assigned the countries referred to in paragraph 66 hereof, and the respective shares of each party in such territory were provided for in said contract;

(b) Titangesellschaft, Terres Rares, and Thann & Mulhouse were to share Japan, Spain, Portugal, Yugoslavia, Switzerland, Bulgaria, Greece, Turkey, China and
41 South America on the basis of 70 per cent for co-conspirator Titangesellschaft, and 30 per cent for co-conspirators Terres Rares and Thann & Mulhouse;

(c) Terres Rares, Thann & Mulhouse, and Societe Industrielle were assigned the territory of France, Belgium, and Holland, subject to certain rights given to co-conspirator Montecatini. The quotas of the respective companies for these markets were fixed in the Contrat a Quatre, hereinafter described;

(d) Co-conspirators Terres Rares, Thann & Mulhouse, and defendant Titan Inc. were to share the markets of Estonia, Latvia, Lithuania, Abyssinia, Liberia, Arabia, Afghanistan, Persia, and Siam (referred to hereinafter as "various countries"). The quotas of the respective companies for these markets were fixed in the Contrat a Quatre, hereinafter referred to;

(e) Co-conspirator Montecatini was granted exclusive rights to manufacture and sell titanium compounds in Italy;

(f) Defendant Titan Inc. was given the exclusive right to manufacture and sell titanium compounds in the territories of Norway, Sweden, and Finland;

(g) Each of the parties to the above contract agreed that they would not give any technical or commercial assistance, or assign any patents or issue licenses, to any person not a party to the contract who delivered titanium compounds into any of the territories covered by the contract.

68. Another of the four contracts referred to in paragraph 65 was executed in June 1935, but was in effect for approximately a year prior thereto. The parties to this contract was co-conspirators Thann & Mulhouse, Terres

Rares, and Societe Industrielle and defendant Titan Inc.

42 This contract was identified and referred to as the Contrat a Quatre, and was supplementary to the Contrat a Six, hereinabove referred to. This agreement fixed the quotas of co-conspirators Terres Rares and Thann & Mulhouse and Societe Industrielle in the market of France and its dependencies and possessions. Co-conspirator Societe Industrielle was assigned 50 per cent of the market, and co-conspirators Terres Rares and Thann & Mulhouse the remainder. This contract also fixed the quotas for the territories of Belgium, Holland, and the various countries, co-conspirators Terres Rares and Thann & Mulhouse being assigned 30 per cent of these markets and defendant Titan Inc. 70 per cent.

69. The last of the four contracts referred to in paragraph 66, called the Contrat de Livraisons, was executed in June 1935, but was actually in effect for approximately one year prior thereto. The parties to this contract were co-conspirators Thann & Mulhouse and Terres Rares on the one hand, and defendant Titan Inc. and co-conspirator Societe Industrielle on the other. This contract provided that the parties thereto would purchase their requirements of titanium compounds for the markets covered by the four contracts in excess of their then capacity from each other. The object and purpose of this contract was to prevent any party from expanding its productive capacity. This contract further provided that none of the products exchanged between the parties should be re-exported, and a similar obligation was to be imposed upon customers of the parties.

70. The above four contracts continued in force and effect until the outbreak of the present war. At that time the last three of the above four contracts were terminated. However, Blumenfeld and co-conspirators Thann & Mulhouse and Terres Rares agreed with defendant Titan Inc. to continue their commercial cooperation on the basis provided for in the several agreements in the same spirit as previously and as far as possible to respect the quotas in the various markets fixed in the above contracts.

71. The four agreements above referred to did not cover the British Empire, and for a time subsequent to their execution, co-conspirator Laporte competed with co-conspirator British Titan in the British Empire, and also exported from Great Britain to the various markets of the world. Defendants National and Titan Inc.

and the other Titan Companies commenced negotiations with co-conspirator Laporte through Blumenfeld in order to induce Laporte to cease such exports from Great Britain. As a result, some time in 1936, Laporte agreed to discontinue exporting titanium compounds outside the British Empire. From time to time subsequent to 1936, co-conspirators British Titan and Laporte entered into agreements establishing uniform prices at which titanium compounds could be sold in Great Britain and other parts of the British market since defendant National had the right to sell titanium compounds in Canada prior to the formation of co-conspirator Canadian Titan, hereinafter described, the cooperation of defendant National was essential in order to establish and maintain uniform prices in Canada. Some time in 1936, defendant National agreed with co-conspirators British Titan and Laporte to establish and maintain fixed prices for the sale of titanium compounds in Canada. Thereafter, negotiations were continued between Laporte and British Titan, and some time in 1941, a quota agreement was entered into between British Titan and Laporte establishing the percentages which each could sell in the British Empire, on the basis of 80 per cent for British Titan and 20 per cent for Laporte. This quota arrangement is still in effect.

72. By virtue of the Contract of 1920 defendant National was given the right to export to Canada and to supply the Canadian market with titanium compounds. After the organization of co-conspirator British Titan, defendant National permitted British Titan to supply the Canadian market for some time. However, commencing some time in 1934, co-conspirator Laporte planned to erect a factory in Canada for the manufacture and sale of titanium compounds, and approached co-conspirator C. I. L. with a view to erecting a joint factory. In order to prevent manufacture and sale of titanium compounds in Canada independently of defendants National and
44 Titan Inc., defendant National decided to eliminate the threat of competition from this source in all markets of the world by forming a new company in association with C.I.L. The consent and approval of defendant du Pont and co-conspirator I.C.I. was required before C. I. L. could enter into such an agreement with defendant National. This was given and the understanding between defendant National and C.I.L. and the new company to be formed, Canadian Titan, was evidenced by five separate

contracts, which were all executed during the year 1937. These contracts, which are still in effect, provided as follows:

(a) The new company, Canadian Titan, was to have the exclusive right to manufacture and sell titanium compounds in Canada, and Canadian Titan agreed to confine all activities relating to the manufacture and sale of titanium compounds to Canada;

(b) Defendant National agreed to conduct all of its operations relating to the manufacture and sale of titanium compounds in Canada through Canadian Titan, and C. I. L. agreed it would not conduct any such operations anywhere in the world except through Canadian Titan;

(c) C. I. L. agreed to grant an exclusive license to Canadian Titan under all patents then owned or which might subsequently be acquired by it, or which should ever be at its disposal relating to the manufacture and sale of titanium compounds.

73. Defendant National entered into a licensing contract with Canadian Titan, under which it granted Canadian Titan a sub-license for the manufacture and sale of titanium compounds under and subject to the provisions of the Contract of 1920. Said licensing contract, which is now in effect, provided as follows:

45 (a) Canadian Titan was assigned Canada, and defendant National was assigned the rest of the world as its territory;

(b) Defendant National granted Canadian Titan for Canadian Titan's territory an exclusive license to manufacture and sell titanium compounds under all patents and processes then owned or which might thereafter be acquired by defendant National, or which should ever be at its disposal. Similarly, Canadian Titan granted to defendant National for National's territory an exclusive license to manufacture and sell titanium compounds under all patents and processes then owned or which might thereafter be acquired by Canadian Titan, or which should ever be at its disposal. It was stipulated that defendant National should grant defendant du Pont a non-exclusive license under any patents or processes so licensed for North and South America whenever requested by defendant du Pont;

(c) Each party agreed that it would not ship titanium compounds into the other's territory without the other's consent, and agreed to impose the same obligation upon its customers;

(d) Defendant National agreed not to export into co-conspirator Canadian Titan's territory any finished articles manufactured by it;

(e) Each party was allowed to grant sub-licenses. The contract, however, provided that neither party could grant licenses, under its own patents or under any patents licensed to it under the contract, unless the licensee or sub-licensee agreed to grant to the other party to the contract an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture and sale of titanium compounds for the territory of such other party, and unless such licensor party compelled the licensee or sub-licensee to agree to all of the territorial restrictions of the contract referred to in sub-paragraphs (a) through (d) hereof;

(f) The contract was to last until 1967.

74. Defendant National and co-conspirators C. I. L. and Canadian Titan eliminated the threat of competition arising from the fact that co-conspirator Laporte in Canada contemplated erecting a factory for the manufacture of titanium compounds, by entering into a contract with Laporte, under the terms of which Laporte transferred to Canadian Titan all the Canadian patents then owned or which might thereafter be acquired by it relating to the manufacture and sale of titanium compounds, and agreed to stay out of the titanium business in Canada for the term of the agreement, which was fifteen years. Canadian Titan has not as yet erected a factory for the manufacture and sale of titanium compounds in Canada. Defendant National, however, sells to Canadian Titan all its requirements for the Canadian market, and defendant National is obligated to cease all such exports as soon as Canadian Titan erects a factory, which it plans to do immediately upon the cessation of the present war.

75. By 1936, the only industrial country of any importance in which there were no local factories for the manufacture and sale of titanium compounds was Japan. Under the terms of the contracts between defendant Titan Inc. and the other Titan Companies and the various Blumenfeld Companies, co-conspirator Titangesellschaft was entitled to 70 per cent of the Japanese market and co-conspirators Terres Rares and Thann & Mulhousey to 30 per cent. Local companies were laying plans to manufacture and sell such compounds, and defendants National and Titan Inc. and co-conspirators I. G. and Titangesellschaft believed that competition would develop not only in the

trade with Japan, but that the Japanese companies would engage in exports which would lead to competition in all markets of the world, including the United States. Consequently, they decided to organize in association with the Japanese chemical company Kokusan and the Blumenfeld Companies, co-conspirators Terres Rares and Thann & Mulhouse, a new company, co-conspirator Titan Kogyo, to engage in the manufacture and sale of titanium compounds in Japan. Seven contracts providing for the formation of the new company were agreed to between Titan Inc. and I. G., Titangesellschaft, Terres Rares, Thann & Mulhouse, Kokusan, and Titan Kogyo. Because of the requirement of the Japanese laws, defendant Titan Inc. and co-conspirators Titangesellschaft, I. G., Thann & Mulhouse, and Terres Rares (hereinafter sometimes referred to as the European-American Group) acted through a Japanese subsidiary of I. G., Doitsu, and appointed Doitsu their agent for the purpose of signing the contracts. These contracts provided:

(a) Kokusan was given 50 per cent of the stock of Titan Kogyo, and defendant Titan Inc. $17\frac{1}{2}$ per cent, I. G. $17\frac{1}{2}$ per cent, and Terres Rares and Thann & Mulhouse 15 per cent. I. G., because of the restrictions of the German Government, was unable to supply the capital necessary to subscribe its share of the stock. Consequently, defendant Titan Inc. subscribed to I. G.'s share and gave I. G. an option to purchase such shares at any subsequent time;

(b) Titan Kogyo was assigned the territory of Japan and its dependencies and possessions. Doitsu, representing the European-American Group, was given the rest of the world;

(c) Doitsu as agent for the European-American Group granted Titan Kogyo for Titan Kogyo's territory a license exclusive of all others, including Doitsu, to manufacture and sell titanium compounds under all patents and processes then owned or which might thereafter be acquired by Doitsu. Similarly, Titan Kogyo granted Doitsu for Doitsu's territory a license exclusive of all others, including Titan Kogyo, to manufacture and sell titanium compounds under all patents and processes then owned or which might thereafter be acquired by Titan Kogyo, or which should ever be at its disposal;

(d) Each party agreed that it would not ship titanium compounds into the other's territory without the other's consent, and agreed to impose the same obligation upon its customers;

(e) Each party to the contract agreed not to import into the other's territory finished articles manufactured by it, and further agreed to prevent such importation by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sales of titanium compounds by the other party in its own territory;

(f) Titan Kogyo was prohibited from granting sub-licenses. Doitsu, however, was permitted to grant sub-licenses under any patents licensed to it under the contract, provided its sub-licensee agreed to grant to Titan Kogyo an exclusive license under all such licensee's or sub-licensee's patents, present and future, relating to the manufacture and sale of titanium compounds for the territory of Titan Kogyo, and provided Doitsu compelled the licensee or sub-licensee to agree to all of the territorial restrictions of the contract referred to in sub-paragraphs (a) through (e) hereof;

(g) The contract was to last at least until 1960.

49 This contract is still in effect.

76. By virtue of the Contract of 1920, defendant National had a non-exclusive license to sell in the South American markets, as did defendant Titan Inc. Some time in 1931, at the request of co-conspirator I. G., defendant Titan Inc. assigned to co-conspirator Titangesellschaft its rights to sell in the South American markets. By virtue of the 1933 contract between defendants National and du Pont and the subsequent arrangements between defendants Titan Inc. and du Pont, defendant du Pont likewise was given the right to sell in the South American markets. While each of said defendants and co-conspirators have shipped into the South American markets, they have refrained from competing with each other in the sale of titanium compounds in such markets, and have allotted to each other various customers purchasing titanium compounds in South America. With the outbreak of the war in September 1939, Titangesellschaft was unable to ship titanium compounds to South America, and thereupon defendant National supplied Titangesellschaft's customers in South America, but agreed to turn over the profit on such sales to Titangesellschaft's customers to Titangesellschaft. This understanding was terminated at the outbreak of war between the United States and Germany.

EFFECT OF THE COMBINATION AND CONSPIRACY

77. The aforesaid combination and conspiracy has had,

as was intended by the defendants and co-conspirators, the following effects:

(a) Defendants and co-conspirators have directly, substantially, and unreasonably restrained interstate and foreign trade and commerce in the manufacture and sale of titanium compounds;

(b) All of the foreign co-conspirators have refrained from exporting titanium compounds into the United States;

(c) Defendants National and du Pont have refrained from exporting titanium compounds outside of the United States except to South and Central America, and except that defendant National has exported some titanium compounds to Canada to be sold only through co-conspirator Canadian Titan, and exports of titanium compounds by all other persons, from the United States to other countries except South and Central America, have been prevented;

(d) Defendants National and du Pont control and dominate the manufacture and sale of titanium compounds in the United States. All other persons have been prevented from manufacturing and selling titanium compounds in the United States except with the consent of defendants National and du Pont. Said defendants National and du Pont have given restricted licenses to American Zirconium Company and the Virginia Chemical Company, which licenses, however, restrict the amount of titanium compounds that each such company can manufacture and sell, with the result that neither of said companies can compete with defendants National and du Pont.

(e) The prices of titanium compounds in the United States have been maintained at uniform and non-competitive levels, and all competition in the manufacture and sale of titanium compounds in the United States has been eliminated.

(f) The markets of the world outside the United States have been allocated and divided among the defendants and co-conspirators by reserving certain markets as exclusive territory for the manufacture and sale of titanium compounds to some of them and by fixing quotas which certain of them were to be permitted to sell in other markets.

(g) Defendants National, du Pont, and Titan Inc. have obtained by force of the agreements and understandings above alleged a monopoly of technical information and of United States patents relating to titanium dioxide used in pigments and have utilized their patents to effect the restraints hereinabove described.

PRAYER

WHEREFORE the plaintiff prays:

1. That the aforesaid combination and conspiracy and the aforesaid contracts, agreements, understandings, activities, and arrangements of the defendants in restraint of and to monopolize trade and commerce in titanium compounds be adjudged and decreed to be unlawful and in violation of Sections 1 and 2 of the Sherman Antitrust Act.

2. That the court adjudge and decree that the defendants have combined and conspired to restrain the foreign and domestic trade and commerce of the United States in titanium compounds in violation of Section 1 of the Sherman Antitrust Act.

3. That the court adjudge and decree that the defendants have combined and conspired to monopolize trade and commerce in titanium compounds among the several states of the United States and with foreign nations in violation of Section 2 of the Sherman Antitrust Act.

4. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations acting or claiming to act on behalf of them be perpetually enjoined from combining and conspiring or agreeing to restrain or monopolize trade and commerce among the several states of the United States or with foreign nations with respect to titanium compounds and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings or claiming any rights

52 thereunder having the purpose or effect of continuing, reviving, or renewing any of the violations of the Sherman Antitrust Act hereinbefore set forth and described.

5. That the Court adjudge and decree that the defendant National Lead take such steps as may be necessary to prevent it from using Titan Company Inc. to eliminate competition between itself and other companies under such terms and conditions and according to such plan or program as may be approved by or subject to the jurisdiction of this Court.

6. That the defendants be enjoined and restrained from threatening or bringing any infringement suit upon any United States patents relating to any invention or inventions which the said defendants have used in carrying out the aforesaid illegal combination, conspiracy, contracts, agreements, and understandings.

7. That the Court adjudge and decree that the defendants and each of them grant upon request to any third person a royalty-free license to make, use, or sell any invention or inventions which defendants have used in carrying out the aforesaid illegal combination, conspiracy, contracts, agreements and understandings, and to furnish with such licenses all technical information appropriate to practice of the said patents and which was subject to or exchanged under the said combination, conspiracy, contracts, agreements, and understandings.

8. That the plaintiff have such other, further, and different relief as the nature of the case may require and the Court may deem just and proper.

9. That the plaintiff recover its taxable costs.

Herbert A. Berman,
HERBERT A. BERMAN,
William C. Dixon,
WILLIAM C. DIXON,

Special Assistants to the Attorney General.

Francis Biddle,
FRANCIS BIDDLE,
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Wendell Berge,
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Assistant Attorney General.

James B. M. McNally,
JAMES B. M. McNALLY,
United States Attorney.

53 In United States District Court

[Title omitted.]

*Answer of National Lead Company and
Titan Company, Inc.*

The defendants National Lead Company and Titan Company, Inc. answer the complaint as follows:

1. Deny each and every averment in paragraph 3, except admit that Titan Inc. is a corporation organized and existing under the laws of Delaware, with its office and principal place of business at 111 Broadway, New York, N. Y., and is made a defendant, that 100 per cent of the stock of Titan Inc. is owned by National, that Titan Inc. now owns and since 1929 has owned a number of patents and held exclusive licenses, with the right to grant sub-

licenses, under patents relating to the manufacture and use of titanium compounds, that Titan Inc. owns the following percentages of the voting stock of the following named foreign companies:

British Titan Products Co., Ltd. 44%

Titangesellschaft g. m. b. h. 50%

Societe Industrielle du Titane 57.638%

Titan Kogyo Kabushiki Kaisha 18½%,

that since its formation in 1929 Titan Inc. and all its policies and activities have been controlled by National, and a majority of Titan Inc.'s officers and directors are and at all times have been officers and directors of National.

2. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 4, except admit that du Pont is a corporation organized and existing under the laws of Delaware with its office and principal place of business at Wilmington, Delaware, that it is one of the largest chemical companies in the United States, and is made a defendant.

3. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 6, except admit that Krebs is named as a coconspirator.

4. Admit each and every averment in paragraph 7, except deny that Titan A/S originally owned all the
54. Jebsen patents, that Titan A/S owns directly large
1. ilmenite deposits, and that since 1927 Titan A/S has
purchased all titanium compounds sold by it from Titangesellschaft.

5. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 8, except admit that before World War II I. G. was a corporation organized and existing under the laws of Germany with its office and principal place of business at Frankfurt-am-Main, that it was one of the largest chemical companies in the world, and is named as a coconspirator.

6. Admit each and every averment in paragraph 9 as to the period before World War II, except deny that Titangesellschaft was organized by National, Titan A/S, and I. G. pursuant to conspiracy.

7. Admit each and every averment in paragraph 10 as to the period before World War II, except deny that

Societe Industrielle entered into a contract with Titan A/S in 1922 under which it received rights to manufacture titanium compounds in France.

8. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 11, except admit that I. C. I. is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, that it was organized by an amalgamation of important British chemical companies, that it is the largest manufacturer of chemicals in the British Empire, and is named as a coconspirator.

9. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 12, except admit that Goodlass Wall is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, that it is the largest producer of lead pigments and fabricator of lead in the British Empire, and is named as a coconspirator.

10. Admit each and every averment in paragraph 14, except deny that British Titan was organized pursuant to conspiracy.

11. Admit each and every averment in paragraph 15, except deny that Laporte is the only other producer of titanium compounds in the British Empire.

12. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 16, except admit that C. I. L. is a corporation organized and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada, and is named as a coconspirator.

13. Admit each and every averment in paragraph 17, except deny that Canadian Titan was organized pursuant to conspiracy.

55 14. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 18, except admit that before World War II Kokusan was an organization existing under the laws of Japan and is named as a coconspirator.

15. Deny each and every averment in paragraph 19, except admit that before World War II Titan Kogyo was a company organized and existing under the laws of Japan with its office and principal place of business at Tokio,

Japan, and that it was the largest manufacturer of titanium compounds in Japan.

16. Admit each and every averment in paragraph 22, except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that Thann & Mulhouse and Terres Rares are affiliated with the French chemical company of Saint Gobain, which is the second largest such company in France, with assets in excess of 500,000,000 francs.

17. Admit each and every averment in paragraph 23, except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that the parent company has a capital in excess of 2,000,000,000 lira.

18. Admit each and every averment in paragraph 24, except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that the office and principal place of business of Aussig is at Prague, Czechoslovakia.

19. Admit each and every averment in paragraph 26, except deny that all titanium compounds have the characteristics averred and that all such compounds are used in the products referred to, and aver that only titanium pigment compounds have the characteristics and uses referred to.

20. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 29, except admit that one Joseph Blumenfeld developed a patented process for the manufacture of titanium compounds and the certain rights under the Blumenfeld patents were acquired by Thann & Mulhouse, Montecatini, Aussig, Laporte, and Commercial Pigments.

21. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 30, except admit that Auergesellschaft had certain patents relating to the manufacture of titanium compounds and that certain of its patent rights were acquired by Krebs.

22. Deny each and every averment in paragraph 31, except admit that certain Jebesen United States patents and certain Barton and Rossi patents had expired by 1936.

23. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 32, except admit that National is the largest

56 manufacturer of titanium pigment compounds in the United States, that National's principal factories for manufacturing such compounds are located at St. Louis, Missouri, and Sayreville, New Jersey, that National sells and ships titanium compounds made by it at these factories into all the states of the United States, that such sales and shipments are generally made to consumers of said products, and that National has exported titanium compounds to South and Central America and Canada; and deny that because of conspiracy National has refrained from exporting to any other country.

24. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 33, except admit that du Pont next to National is the largest manufacturer of titanium pigment compounds in the United States.

25. Deny each and every averment in paragraph 34, except admit that American Zirconium Company is a subsidiary of Glidden Company of Cleveland, Ohio, that it manufactures titanium pigment compounds at a factory located at Baltimore, Maryland, and ships such compounds to states of the United States.

26. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 35, except admit that Virginia Chemical Company was a subsidiary of Interchemical Company, that it manufactures titanium compounds and ships such compounds to states of the United States, and deny that pursuant to conspiracy they have restrained the production and sale of titanium compounds by Virginia Chemical Company.

27. Deny each and every averment in paragraph 36.

28. Deny each and every averment in paragraph 37, except admit that the corporate defendants and alleged conspirators include substantially all the important manufacturers of titanium compounds in the world.

29. Deny each and every averment in paragraphs 38 and 39.

30. Admit each and every averment in paragraph 40, except deny that each party agreed to prevent the importation into the other party's territory of finished articles, that is, manufactured articles such as paint, glass, and rubber utilizing any titanium compounds as one of the raw materials for the manufacture thereof, if the importation of such finished articles interfered in any way with

sales of titanium compounds by the other party in its own territory.

31. Admit each and every averment in paragraph 42, except deny that each party agreed to prevent importation of finished articles by customers purchasing titanium compounds from it if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory.

32. Deny each and every averment in paragraph 44, except aver that National acquired the controlling interest in Titan A/S in 1927.

33. Deny each and every averment in paragraph 45, except admit that Titan A/S entered into negotiations with I. G. in 1925 or 1926 and in 1927 agreed with I. G. to form a new company, Titangesellschaft, which was to be given exclusive licenses for the countries of Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Roumania, Serbia, Croatia, Slovenia, Bulgaria, Greece, Turkey, Japan, China, and Spain for the manufacture and sale of titanium pigment compounds, that Titan A/S, I. G., and Titangesellschaft entered into nine separate contracts that provided for the organization of Titangesellschaft and the control of its activities, and that the provisions of said contracts are in substance as stated in paragraph 45 (a) through (f); but deny that each party agreed to prevent importation of finished articles by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory.

34. Deny each and every averment in paragraph 46, except admit that Titangesellschaft assigned to Titan Inc. substantially all of its United States patents and that Titan Inc. assigned substantially all of its German patents to Titangesellschaft.

35. Admit each and every averment in paragraph 47, except deny that Titan A/S, after it discontinued its manufacturing operations in Norway, purchased all of its requirements of titanium compounds from Titangesellschaft.

36. Deny each and every averment in paragraph 48, except admit that in 1929 National organized Titan Inc. under the laws of Delaware and transferred to it all of the patents and licensing rights then owned by Titan A/S as well as Titan A/S's interest in Titangesellschaft, and

National's stock interest in Societe Industrielle, that Titan Inc. thereupon assumed all of the obligations of Titan A/S under the contract of 1920 and under certain other contracts theretofore entered into by Titan A/S, and that Titan A/S continued its other activities and acted as agent for Titan Inc. in part of Titan Inc.'s territory.

37. Deny each and every averment in paragraph 49, except admit that Sachtleben is a German corporation affiliated with Metallgesellschaft and that some time in 1933 Sachtleben informed I. G. that it was going to undertake the manufacture and sale of titanium compounds.

38. Deny each and every averment in paragraph 50, except admit that in 1933 Titan Inc. entered into negotiations with I. C. I., Goodlass Wall, and I. S. C. as a result of which the parties entered into a series of contracts and that these contracts are in substance as stated in paragraph 50 (a) through (d), except deny that each party agreed to prevent importation of finished articles by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory.

39. Deny each and every averment in paragraph 52, except admit that National and Titan Inc. carried on negotiations with the various Blumenfeld companies and with Commercial Pigments, that European negotiations were conducted by Titangesellschaft and Gustav Jebsen, that negotiations on behalf of the Blumenfeld companies in Europe were conducted chiefly by Blumenfeld, that negotiations in the United States on behalf of National were conducted chiefly by National's former vice-president McCarty and on behalf of Commercial Pigments by its officers Tiehnor and Chase.

40. Deny each and every averment in paragraph 53, except admit that in 1931 Krebs purchased Commercial Pigments, which thereupon ceased business, and that Krebs continued the titanium business of Commercial Pigments.

41. Deny each and every averment in paragraph 54, except admit that National and du Pont through their respective subsidiaries, Titanium Pigment and Krebs, executed a written contract dated January 1, 1944 which provided as to titanium compounds useful as a pigment substantially as stated in (a) through (d) of paragraph 54.

42. Deny each and every averment in paragraph 55, except admit that National submitted the contract men-

tioned in paragraph 54 to British Titan, Societe Industrielle, Titangesellschaft, and I. G. for approval and that the Titan companies and I. G. gave their consent and approval to the execution of said contract.

43. They are without knowledge or information sufficient to form a belief as to the truth of each and every averment in paragraph 56, except admit that du Pont assumed the obligations of Krebs under the 1933 contract referred to in paragraph 54.

44. Deny each and every averment in paragraph 57.

45. Deny each and every averment in paragraph 58, except admit that beginning with the year 1937 and each year thereafter through 1941 du Pont and Titan Inc. entered into contracts under the terms of which du Pont granted Titan Inc. exclusive licenses, with the right to grant sublicenses, that du Pont reserved operating rights in all such contracts, and that in several contracts Titan Inc. granted du Pont a license under patents which Titan Inc. then owned or under which it had a right to issue sublicenses.

46. Deny each and every averment in paragraph 59.

47. Deny each and every averment in paragraph 60, except admit that the written contract of 1933 between Titanium Pigment and Krebs was modified by a supplemental contract between National and du Pont which provided for a discontinuance of the exchange of technical information but confirmed the obligations of said contract of 1933 in all other respects and that the same is now in effect.

48. Deny each and every averment in paragraph 61.

49. Deny each and every averment in paragraph 62, except admit that in or about 1934 Zirconium erected a factory at Baltimore, Maryland, for the manufacture and sale of titanium compounds, that Zirconium at that time was owned 50% by the Glidden Company of Cleveland, Ohio, and 50% by Metal and Thermit Corporation of New York City, that said 50% stock interest of Metal and

50. Thermit had been issued in exchange for patents which it possessed for the manufacture of such compounds, that Zirconium accepted a license from National and also from du Pont, and that National notified Zirconium that it was infringing National's patents, but they are without knowledge and information sufficient to form a belief as to the truth of the averment that du Pont notified Zirconium that it was infringing du Pont's patents.

50. Admit each and every averment in paragraph 63, except deny that National has any agreement with Zirconium or holds any stock in Zirconium.

51. They are without knowledge or information sufficient to form a belief as to the truth of each and every allegation in paragraph 64, except admit that prior to 1937 Virginia Chemical erected a factory for the production of titanium compounds, and thereafter manufactured and sold such compounds, that National has not licensed Virginia Chemical, and that National notified Virginia Chemical that it was infringing patents of National; but deny that National and du Pont agreed that they would utilize the threat of infringement proceedings to compel Virginia Chemical to accept a license, which would so control the operations of Virginia Chemical as to prevent it from becoming a competitor of National and du Pont, and that before du Pont granted a license to Virginia Chemical it secured the approval of National to the terms of said license.

52. Deny each and every averment in paragraph 65, except admit that in 1933 negotiations were being carried on between representatives of various Titan companies and various Blumenfeld companies, and that these negotiations resulted in certain contracts between certain Titan companies and certain Blumenfeld companies.

53. Admit each and every averment in paragraph 66, except deny that to prevent Aussig from expanding its production facilities it was provided that Aussig should purchase all its requirements of titanium compounds in excess of its then capacity from Titangesellschaft.

54. Admit each and every averment in paragraph 67, except deny that each party agreed to impose on its customers the obligation to renounce any rights in the territory of the other.

55. Admit each and every averment in paragraph 69, except deny that the object and purpose of the contract referred to was to prevent any party from expanding its productive capacity.

56. Admit each and every averment in paragraph 70, and aver that Montecatini terminated Contrat a Six in December 1938.

57. Admit each and every averment in paragraph 71, except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that the quota arrangement referred to is now in effect.

58. Admit each and every averment in paragraph 72, except deny that in order to prevent the manufacture and sale of titanium compounds in Canada independently of National and Titan Inc. National decided to eliminate the threat of competition from this source in all markets of the world by forming a new company in association with C. I. L., and they are without knowledge or information sufficient to form a belief as to the truth of the averment that the consent and approval of du Pont and I. C. I. was required before C. I. L. could enter into an agreement with National.

59. Admit each and every averment in paragraph 73, except deny that the sublicense referred to was under and subject to all provisions of the contract of 1920.

60. Admit each and every averment in paragraph 74, except deny that under the terms of the contract Laporte transferred to Canadian Titan all the Canadian patents then owned or which might thereafter be acquired by it relating to the manufacture and sale of titanium compounds.

61. Admit each and every averment in paragraph 75, except deny that each party agreed to prevent importation of finished articles by customers purchasing titanium compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium compounds by the other party in its own territory.

62. Deny each and every averment in paragraph 76, except admit that by virtue of the contract of 1920 National had a nonexclusive license to sell in South American markets, as did Titan A/S, and that in 1931 Titan Inc. assigned to Titangesellschaft its rights to sell in the South American markets.

63. Deny each and every averment in paragraph 77.

WHEREFORE the defendants National Lead Company and Titan Company, Inc. demand judgment dismissing the complaint as against each of them, with costs and disbursements.

September 15, 1944.

CLIFTON P. WILLIAMSON,
120 Broadway, New York 5, N. Y.,

BETHUEL M. WEBSTER,
15 Broad Street, New York 5, N. Y.,
Attorneys for National Lead Company
and Titan Company, Inc.

[Title omitted.]

Answer of E. I. du Pont de Nemours and Company

The defendant, E. I. du Pont de Nemours and Company, by its attorneys, for its answer to the Complaint herein, admits, denies and avers as hereinafter set forth.

ANSWERING GENERALLY

Du Pont* denies that it is now or ever has been engaged in or a party to any alleged agreement, combination or conspiracy in restraint of trade or commerce in titanium compounds or that it is now or ever has been monopolizing or attempting to monopolize such trade or commerce, in violation of Section 1 or of Section 2 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Antitrust Act.

Du Pont avers that:

The use of titanium compounds as a white pigment is a relatively new commercial development. At the beginning of the period covered by the Complaint titanium pigments were manufactured and sold in the United States in only small quantities. The white pigment market was then occupied and supplied almost entirely by other forms of white pigments, principally lithopone, white lead and zinc oxide. These types of white pigments have throughout this period been produced by many different manufacturers, and, in spite of the commercial development of titanium pigments, such other white pigments have continued to be sold in substantial quantities. Producers of all types of white pigments including titanium compounds compete, and the commercial introduction of titanium compounds simply widened and intensified the competition which has at all times existed in the white pigment field. Du Pont has been, and is, in active, open and vigorous competition not only with National and other titanium compound manufacturers but also with other manufacturers engaged in manufacturing and selling the various other types of competing white pigments.

Du Pont determined to enter the titanium pigment busi-

* The terms "du Pont" and "National" as used in the portion of this answer designated "Answering Generally" refer to E. I. du Pont de Nemours and Company and National Lead Company and their respective subsidiary and associated companies.

ness because it recognized that this type of pigment constituted a new and important development in the white pigment field. At such time, however, the titanium pigment art was already well developed and strong patent positions had been established by both National and Commercial Pigments Company, the only existing titanium pigment manufacturers in the United States. Each of these companies not only held basic patents and 64 patent applications in the field, but the programs of each for research and development of new and improved products and processes were well advanced.

Du Pont considered entering the manufacture of titanium pigments throughout the development of an independent process, but after expending large sums for research concluded that in view of the strength and scope of the patent positions of National and Commercial Pigments Company it was not commercially feasible to do so until some of the then outstanding patents had expired. Thereupon du Pont acquired the assets of Commercial Pigments Company, thus obtaining a position in the titanium pigment business.

In operating the Commercial Pigments processes, du Pont was still confronted with the serious risk of infringement of National's patents. Du Pont, therefore, sought and obtained non-exclusive licenses under the patents controlled by National for producing titanium pigments. This was accomplished through the January 1, 1933, agreement, a copy of which is annexed hereto as Exhibit A. Du Pont thus freed itself to engage in unhampered competition with National.

Since du Pont entered the titanium pigment field, the quantity of titanium compounds manufactured and sold in the United States has steadily increased. Total United States plant capacity for pure titanium dioxide manufacture grew in the period from 1931 to 1943 from less than 20,000 tons per annum to more than 100,000 tons per annum. During the same period du Pont expanded its own productive capacity about 400% and its plants, at all times, have operated at or near capacity.

Similarly, the quality of titanium pigments manufactured and sold in the United States has steadily improved to meet competition and the higher and more exacting requirements of various users. Many new grades have been created and new uses developed, all to the advantage of the consumer. Du Pont has expended large sums on re-

search and has contributed materially to these developments.

65 The price of titanium pigments sold in the United States is a competitive price which has resulted through the operations of free and open competition. This price substantially and consistently decreased until the beginning of World War II, when economic factors required minor price increases.

The relative amount of titanium pigments sold by du Pont and other American producers has varied as the result of the keen and vigorous competition existing among such producers. Du Pont has lost customers to and gained customers from its competitors, including National; it has both initiated and been obliged to meet price reductions; and it has constantly sought new means and methods for improving the quality and type of its titanium pigments and the efficiency of its manufacturing processes. New competitors have been able to enter the field partly with the assistance of licenses granted them at reasonable royalties by du Pont.

Du Pont has never been a party to any agreements allocating or dividing titanium compound markets, nor has it ever authorized anyone to enter into any such agreement or arrangement on its behalf. Du Pont has not sought to prevent its customers from exporting, nor has it placed any restraints upon exports by its licensees. Subject only to conflicting patent rights, du Pont is free to sell titanium compounds in any market of the world where competitive conditions permit.

Du Pont has not exported titanium pigments in substantial quantities because of the operation of one or more of a number of business, economic, political and legal factors beyond du Pont's control; including the tariff and patent laws and other requirements of foreign countries, the low labor costs of foreign countries permitting production of titanium compounds at lower cost, local preference for homemade goods, transportation costs and preference in certain foreign countries for lithopone or other types of pigments as opposed to titanium compounds. Nevertheless, it has exported some titanium pigments to Canada, Mexico, Cuba, and South and Central America.

Du Pont is not able, through exercise of its patent rights or otherwise, to prevent other persons from manufacturing and selling titanium compounds in the United States.

Many of the basic patents in the titanium pigment field have long since expired, rendering the processes and products available free to newcomers in the art. In addition, there are and for some time past have been alternative methods of manufacturing titanium pigments which are not controlled by any patents, either those held by du Pont or those held by National; and numerous United States titanium pigment patents are held by concerns other than National, Titan, Inc., and du Pont. Du Pont does own patents covering inventions for improved types and processes for the manufacture of titanium pigments, and in respect of these has granted licenses to American Zirconium Company and Virginia Chemical Company which have assisted these concerns in manufacturing high-grade titanium dioxide more economically and efficiently.

ANSWERING SPECIFICALLY

Without limiting the generality of the foregoing in any way du Pont* admits, denies and avers in respect of each of the paragraphs of the Complaint as follows (the succeeding paragraphs being numbered to correspond with the numbering of the paragraphs of the Complaint):

1. Du Pont admits the allegations of this paragraph except that it denies that it has violated Section 1 or 2 of the Sherman Antitrust Act in the manner alleged or otherwise.

67 2. Du Pont admits that National is a corporation organized and existing under the laws of the State of New Jersey, has its office and principal place of business at 111 Broadway, New York, New York, and is named a defendant herein; that it is one of the largest manufacturers of pigments in the United States and manufactures at least 50% of the titanium compounds useful as pigments produced in the United States. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

3. Du Pont admits that Titan, Inc. is a corporation organized and existing under the laws of the State of Delaware, has its office and principal place of business at 111 Broadway, New York, New York, and is named a defendant herein; and that it now owns and for some time

* Hereafter in this answer E. I. du Pont de Nemours and Company and the other companies mentioned in this answer will be referred to in the abbreviated form used in the Complaint. The references throughout the Complaint to a person or company as a "conspirator" or "co-conspirator" are ignored in this answer as mere characterizations or conclusions of law and shall be deemed in all instances denied.

past has owned or held a number of patents, licenses and licensing rights relating to the manufacture and use of titanium compounds. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

4. Du Pont admits that it is a corporation organized and existing under the laws of the State of Delaware, has its office and principal place of business at Wilmington, Delaware, and is named a defendant herein; that it is a large manufacturer of chemical products and has gross assets in excess of one billion dollars; and that it is one of the largest manufacturers of pigments in the United States. Du Pont denies that it manufactures approximately 45% of the titanium compounds made in the United States. Except as to those facts specifically admitted or denied, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

5. Du Pont admits that Titanium Pigment was a corporation organized in 1916 and, until its dissolution 68 in 1936, existed under the laws of the State of Maine; that it is not named a defendant herein but is named as a co-conspirator; and that prior to 1920 Titanium Pigment had erected a factory at Niagara Falls, New York, for the manufacture of titanium compounds and was there manufacturing such compounds; that in or about 1920 National acquired a substantial stock interest in said company; and that in or about 1936 National dissolved said company and thereafter conducted its operations for the production of titanium compounds in the United States directly. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

6. Du Pont admits and avers that Krebs Pigment and Color Corporation, hereinafter called Krebs, was a corporation organized and, until its dissolution in 1943, existing under the laws of the State of Delaware; and is not named a defendant herein but is named as a co-conspirator; that in 1929 du Pont acquired the Krebs Pigment and Chemical Company, which company was an established manufacturer of lithopone pigments; that in 1931 du Pont and Commercial Solvents Corporation organized a new company, Krebs, in which du Pont acquired approximately 70% of the capital stock; that du Pont, among other

things, turned over to Krebs the assets of Krebs Pigment and Chemical Company and Commercial Solvents Corporation turned over to Krebs the assets of Commercial Pigments Company, which at that time was a corporation engaged in the manufacture and sale of titanium compounds in the United States under certain United States patents and applications acquired from one Blumenthal; that from 1931 to 1935 Krebs manufactured and sold titanium compounds, but in 1935 all manufacturing assets of Krebs were assigned to du Pont, and that Krebs thereafter ceased to manufacture, but continued as a selling company for du Pont's Krebs Pigments Department until the dissolution of Krebs in 1943; and that since

69 1943 to the present time du Pont has conducted all of its titanium compound operations directly through its Pigments Department. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

7. Du Pont admits that Titan A/S was a corporation organized and existing under the laws of the Kingdom of Norway, had its office and principal place of business at Fredriksstad, Norway, and is not named a defendant herein but is named as a co-conspirator; and that Titan A/S was at one time engaged in the manufacture of titanium compounds in Norway. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

8. Du Pont admits the allegations of this paragraph, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that I. G. is the largest corporation in Germany.

9. Du Pont admits that Titangesellschaft was a corporation organized and existing under the laws of Germany, had its office and principal place of business at Leverkusen, Germany, and is not named a defendant herein but is named as a co-conspirator. Du Pont denies that Titangesellschaft was organized pursuant to any alleged conspiracy to which du Pont was or is a party and denies that du Pont was or is a party to any such conspiracy. Except as to those facts specifically admitted or denied, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

10. Du Pont admits that Societe Industrielle was a corporation organized and existing under the laws of France,

had its principal place of business at Paris, France, and is not named a defendant herein but is named as a co-conspirator. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

70 11. Du Pont admits the allegations of this paragraph.

12. Du Pont admits the allegations of this paragraph, except that it is without knowledge or information sufficient to form a belief as to whether Goodlass Wail is the largest producer of red and lead pigments in the British Empire.

13. Du Pont admits the allegations of this paragraph.

14. Du Pont admits the allegations of this paragraph, except that it denies that British Titan was organized pursuant to any alleged conspiracy to which du Pont was or is a party and denies that du Pont was or is a party to any such conspiracy.

15. Du Pont admits the allegations of this paragraph, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that Laporte is the only other producer of titanium compounds in the British Empire.

16. Du Pont admits and avers that C.I.L. is a corporation organized and existing under the laws of the Dominion of Canada, has its office and principal place of business at Montreal, Canada, and is not named a defendant herein but is named as a co-conspirator; that C.I.L. is the largest manufacturer of chemicals in the Dominion of Canada; and that approximately 85% of the stock of C.I.L. is held by du Pont and I.C.I. in approximately equal shares. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

17. Du Pont admits the allegations of this paragraph, except that it denies that Canadian Titan was organized pursuant to any alleged conspiracy to which du Pont was or is a party and denies that du Pont was or is a party to any such conspiracy.

18. Du Pont admits that Kokusan was an organization existing under the laws of Japan, and is not named a defendant herein but is named as a co-conspirator. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

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19. Du Pont admits that Titan Kogyo was a company organized and existing under the laws of Japan, had its office and principal place of business at Tokio, Japan, and is not named a defendant herein but is named as a co-conspirator, and that Titan Kogyo was a manufacturer of titanium compounds in Japan. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

20. Du Pont avers that the term "Allied Companies" has been adopted by the pleader purely for purposes of his own convenience and is not justified by any relationship which exists or has ever existed between du Pont and the other companies so designated.

21. Du Pont admits that Terres Rares was a corporation organized and existing under the laws of France, with its office and principal place of business at Paris, France, and is not named a defendant herein but is named as a co-conspirator, and that Terres Rares acquired certain Blumenfeld foreign patents for the manufacture of titanium compounds. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

22. Du Pont admits that Thann & Mulhouse was a corporation organized and existing under the laws of France, had its office and principal place of business at Paris, France, and is not named a defendant herein but is named as a co-conspirator, and that Thann & Mulhouse was a manufacturer of titanium compounds in France. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

23. Du Pont admits that Montecatini was a corporation organized and existing under the laws of Italy, had its office and principal place of business at Milan, Italy, and is not named a defendant herein but is named as a co-conspirator, and that Montecatini was a manufacturer of titanium compounds in Italy and was a subsidiary of a company of that name which was a large manufacturer of chemicals in Italy. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

24. Du Pont admits that Aussig was a corporation organized and existing under the laws of Czechoslovakia, had its office and principal place of business at Prague, Czecho-

slovakia, and is not named a defendant herein but is named as a co-conspirator. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

26. Du Pont admits and avers that titanium is an abundant element on the earth's surface, but avers that as such it has no value as a pigment and further admits that the principal titaniferous ores are ilmenite and rutile; that titanium compounds useful as pigments have become of increasing commercial importance since the last war; that because of certain characteristics which such titanium compounds, especially titanium dioxide, possess, such as their opacity, great hiding power, and chemical inertness, they are today largely displacing certain white pigments, such as lithopone and white lead; that the titanium compound industry is a little over twenty year old and that over 100,000 tons of pure titanium dioxide are produced and sold in the United States annually, and that the principal use of titanium compounds is for the manufacture of paints, although they are also used in the manufacture of certain grades of rubber, glass, paper and vitreous enamels. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

27. Du Pont admits that certain development work in the production of titanium compounds was carried on in the United States by two chemists, Barton and Rossi; that Titanium Pigment was incorporated in 1916 and acquired the Barton and Rossi patents and built a factory at Niagara Falls, New York, for the production of titanium compounds and that this company was subsequently acquired by and became a part of National. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

28. Du Pont admits that at substantially the same time as Barton and Rossi were developing their process for the manufacture of titanium compounds in the United States, Gustav Jebsen was developing another process for the manufacture of titanium compounds useful as pigments in Norway and that Titan A/S acquired certain Jebsen foreign patents. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

29. Du Pont admits that a chemist by the name of Joseph Blumenfeld also developed and patented a process for the manufacture of titanium compounds useful as pigments; that he transferred certain foreign patent rights covering this process to Terres Rares, which then proceeded to exploit the process by a series of licensing agreements, and that the Blumenfeld United States patents were assigned to Commercial Pigments. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

30. Du Pont admits and avers that Auergesellschaft had a process for the manufacture of titanium compounds and had engaged in their manufacture in Germany in the early 1920's; that Krebs acquired by purchase at a nominal sum from Travancore Minerals Company, Ltd., a British company, a number of United States and foreign patents relating to titanium compounds which Travancore

74 Minerals Company, Ltd., had originally acquired from Auergesellschaft; that such patents proved to be of little value and were never employed commercially in the United States, and that all of the foreign patents were either sold or allowed to become abandoned. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

31. Du Pont denies each and every allegation of this paragraph, except that du Pont admits that some of the United States patents issued to Jebson and Barton and Ricci had expired by 1936.

32. Du Pont admits that National is the largest manufacturer of titanium compounds in the United States; that National's principal factories are located at St. Louis, Missouri, and Sayreville, New Jersey; that National sells and ships the titanium compounds so made by it at these factories in and to states of the United States, such sales and shipments being generally made to consumers of such products located throughout the country, and that National has exported titanium compounds to Canada. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegation that National has exported titanium compounds to South and Central America or the allegation that National has refrained from exporting any such compounds to any other country in the world. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

32. Du Pont admits that, next to National, it is the largest manufacturer of titanium compounds in the United States; that du Pont's factories for the manufacture of such compounds are located at Baltimore, Maryland, and Edge Moor, Delaware; that du Pont sells and ships titanium compounds made by it at such factories in and to states of the United States; that du Pont follows the general policy of shipping such compounds directly to consumers located throughout the country; and
75 avers that du Pont has exported titanium compounds from the United States to Canada, Mexico, Cuba and to South and Central America. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

34. Du Pont admits that American Zirconium Company is a subsidiary of Glidden Company of Cleveland, Ohio, and manufactures titanium compounds at a factory located at Baltimore, Maryland, from which it sells and ships the titanium compounds made by it in and to states of the United States and avers that du Pont assisted Zirconium in manufacturing high-grade titanium dioxide more economically and efficiently by the grant of a license under du Pont patents and applications. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

35. Du Pont admits that Virginia Chemical Company was a subsidiary of Interchemical Company and manufactures titanium compounds at a factory located at Piney River, Virginia, from which it sells and ships titanium compounds made by it in and to states of the United States, and avers that du Pont assisted Virginia Chemical in manufacturing high-grade titanium dioxide more economically and efficiently by the grant of a license under du Pont patents and applications. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

36. Du Pont denies each and every allegation of this paragraph.

37. Du Pont denies each and every allegation of this paragraph.

38. Du Pont denies each and every allegation of this paragraph.

39. Du Pont denies each and every allegation of this paragraph.

75 - 40. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each

and every allegation of this paragraph except that du Pont admits that Titanium Pigment and Titan A/S entered into a written contract in or about 1920.

41. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

42. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

43. Du Pont admits that in or about 1927 National acquired approximately 87% of the stock of Titan A/S and that since in or about 1936 National has directly operated the business of manufacturing and selling titanium compounds in the United States. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

44. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

45. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

46. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

47. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

48. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

49. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

50. Du Pont admits that sometime in 1933 I.C.I., Goodlass Wall, I.S.C., and National after negotiations formed a new company, British Titan. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

51. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph, except that it admits that British Titan erected a factory for the manufacture of

titanium compounds at Billingham, England, and became a manufacturer of titanium compounds.

52. Du Pont admits that for some time prior to 1930 Commercial Pigments was manufacturing titanium compounds in the United States under the Blumenfeld process but denies that Commercial Pigments was competing with National and Titan, Inc., in various markets of the world; other than the United States, in the manufacture and sale of titanium compounds. Except as to those facts specifically admitted or denied, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

53. Du Pont admits and avers that sometime in 1931 Krebs acquired the assets and manufacturing facilities of Commercial Pigments which thereupon ceased business, and that Krebs continued the titanium business of Commercial Pigments in conjunction with Krebs-lithopone and dry color business; that at the same time Krebs acquired all of the United States titanium compounds patents and applications owned by Commercial Pigments. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegation as to any meeting

78 between Jebson or any official of Titangesellschaft with Blumenfeld or any other representative of any Blumenfeld Company abroad. Du Pont avers that

the patents acquired by Krebs from Commercial Pigments included certain patents which, among other things, covered the titanium compound-producing methods employed in the Commercial Pigments plant wherein a seeding hydrolysis procedure for accelerating titanium dioxide precipitation and substantially increasing the yields of such product was employed; that du Pont had undertaken at various times patent infringement investigations to determine whether Commercial Pigments plant operation as well as other pigment-producing operations which du Pont or Krebs were contemplating undertaking infringed existing United States patents including those owned or controlled by National; that in pursuance thereof du Pont determined that the existing Commercial Pigments operations did, and that the contemplated pigment operations would in fact, infringe process and product patents of National; that following Krebs' acquisition of Commercial Pigments, du Pont on behalf of Krebs opened negotiations with National for the sole object and purpose of resolving such infringement questions; that these negotiations continued from time to time thereafter during the years 1931,

1932 and 1933 and were in no way a continuation of or in any way related to negotiations between National and Commercial Pigments; that the parties sent their technical and patent representatives to inspect the processes and apparatus used by each party in their respective titanium compound plants in order to determine whether either party was infringing by its plant practice the patents of the other and if so the extent and duration of such infringement; that at the conclusion of such plant inspection each party determined that the operations of the other did in fact infringe outstanding patents which it owned or controlled; that National's plant operations were determined by du Pont to infringe certain of Krebs' patents; and that National confirmed the existence of infringement of certain of its patents by Krebs; that the parties

79 and their respective counsel determined that many areas of controversy existed and that the patent situation was unquestionably so involved that both companies were faced with the certainty of continued and prolonged disputes with the resulting protracted and very costly litigation; that to overcome this and to free each party and permit it to proceed with the manufacture, use and sale of titanium compounds, the parties decided to enter into the agreement which was subsequently executed, dated January 1, 1933, a copy of which is hereto annexed as Exhibit A. Except as to those facts specifically admitted or averred, du Pont denies each and every allegation of this paragraph.

54. Du Pont admits that Krebs and Titanium Pigment entered into a written contract dated January 1, 1933, but which was actually executed some months later, a copy of which is hereto annexed as Exhibit A, and avers that this written contract contains the complete and full terms of the understanding and agreement between Titanium Pigment and Krebs. Du Pont further admits and avers that it was unwilling for Krebs or itself to execute a written contract, or in any other way agree, to restrict the right of du Pont or Krebs to export titanium compounds produced under licenses or otherwise or which would obligate du Pont or Krebs to grant exclusive licenses to any specified party or parties under foreign titanium compound patents which might be at their disposal, because such undertakings might be considered in violation of the antitrust laws, and du Pont and Krebs each made its position in this regard unequivocally clear to National

throughout negotiations which led to the written contract dated January 1, 1933. Du Pont is without knowledge or information sufficient to form a belief as to the truth of allegations concerning the provisions of the Contract of 1920. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

55. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the terms of the contracts between the Titan Companies and National with regard to licensing du Pont. Du Pont denies each and every other allegation of this paragraph.

56. Du Pont admits that on January 1, 1936 it acquired the assets of Krebs and assumed all of its obligations including the written agreement between Krebs and National, dated January 1, 1933, and that du Pont has observed the terms of such agreement subject to certain modifications made therein by written agreement between du Pont and National from time to time. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

57. Du Pont denies each and every allegation of this paragraph.

58. Du Pont admits and avers that in each of the years 1937 to 1941, inclusive, it and Titan, Inc., entered into patent agreements involving specifically designated inventions under the terms of which du Pont granted to Titan, Inc., exclusive licenses, with the right to grant sub-licenses to one or more of the following, Titangesellschaft, British Titan, Societe Industrielle and, from 1939 to 1941, inclusive, Titan Kogyo, under certain specified patents and patent applications of du Pont in certain specified countries relating to the manufacture of titanium compounds useful as pigments; that each of said licenses was only for the particular countries in which the licensed patents and applications were issued or pending; that du Pont reserved for itself and its subsidiaries the right to use and employ the inventions covered by such patents; and that Titan, Inc., granted du Pont, with the consent of National, non-exclusive licenses under certain specified United States patents and patent applications. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

59. Du Pont denies each and every allegation of this paragraph.

60. Du Pont admits and avers that as of May 1, 1940 the exchange of technical information between National and du Pont was discontinued at the insistence of du Pont with the agreement and acquiescence of National; that the agreement of 1933 between Titanium Pigment and Krebs, which had been assumed by National and du Pont, respectively, was subsequently amended to eliminate provisions for exchange of technical information and in other respects by an agreement between National and du Pont, dated January 1, 1941, a copy of which is hereto annexed as Exhibit B; and that the agreement of 1933, as amended by the agreement of January 1, 1941, is now in effect. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

61. Du Pont denies each and every allegation of this paragraph.

62. Du Pont admits that in or about the year 1934 Zirconium erected a factory at Baltimore, Maryland, for the manufacture and sale of titanium compounds; that Krebs, acting independently of National, notified Zirconium that it held certain titanium compound patents; that Krebs licensed Zirconium to manufacture, use, and sell certain specified annual titanium dioxide tonnages under certain du Pont titanium compound patents; and that National licensed Zirconium under certain of its titanium compound patents. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the ownership of Zirconium and the consideration for the issuance of Zirconium's stock to National and the allegations as to the relations and negotiations between National and Zirconium which led to the licensing of Zirconium by National. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

82 63. Du Pont admits and avers that Krebs licensed Zirconium, under certain of its United States patents for producing anatase titanium dioxide, to manufacture, use and sell 3000 tons a year of such titanium dioxide for the three years beginning with 1935, 6000 tons a year for the six years beginning with 1938, and 9000 tons a year for the balance of the term of the agreement which runs until the expiration of all of the patents in 1951; that Zirconium agreed to pay Krebs a royalty equal to 2 per cent per pound of the selling price of all titanium dioxide produced by Zirconium; that in 1937, 1939 and 1941 du Pont, at the request of Zirconium, increased the amount of titanium dioxide which Zirconium under the

license agreement was granted the right to produce under du Pont's patents; and that du Pont, upon Zirconium's request in 1943, broadened such license to include du Pont's rutile titanium dioxide producing patents and applications on the same terms and conditions as the license theretofore granted under the anatase titanium dioxide patents and applications. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

64. Du Pont admits and avers that sometime prior to 1937 Virginia Chemical acquired a plant for the production of titanium compounds and thereafter manufactured and sold titanium dioxide pigments; that du Pont, acting independently of National, notified Virginia Chemical that it held certain titanium compound patents; that Virginia Chemical established to du Pont's satisfaction that its proposal to manufacture a calcium base titanium pigment did not infringe certain of du Pont's patents; that at the same time Virginia Chemical indicated a desire to acquire a license under du Pont's patents to manufacture, use and sell pure titanium dioxide and du Pont agreed to grant such license; that in 1937 du Pont licensed Virginia Chemical under certain of its United States patents for producing anatase titanium dioxide to manufacture, use and sell 3000 tons of titanium compounds for three

83 years commencing with October 1, 1937, 6000 tons for the next six years, and 9000 tons during the remainder of the license period, which was until 1953; that in 1938, twice in 1939, 1940 and twice in 1941 du Pont, at the request of Virginia Chemical or voluntarily, increased the amount of titanium compounds which Virginia Chemical under the terms of the license agreement was granted the right to produce under du Pont's patents; that du Pont in 1943, on its own initiative, broadened such license to include du Pont's rutile titanium dioxide producing patents and applications on the same terms and conditions as the license theretofore granted under the anatase titanium dioxide patents and applications. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning National's negotiations with Virginia Chemical. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

65. Du Pont admits that in or about 1933 negotiations were proceeding in Europe between Titan, Inc. and the

other Titan Companies and the various Blumenfeld Companies relative to the manufacture and sale of titanium compounds. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

66. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

67. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

68. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

69. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

84 70. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

71. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

72. Du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegations respecting the rights of National under the Contract of 1920, the dealings between National and British Titan relative to the Canadian market, the plans of Laporte and National's purpose or reasons for forming Canadian Titan. Du Pont admits that contracts were entered into between National and C. F. L. and the new company to be formed, Canadian Titan, which were executed during the year 1937, which are still in effect and which contain provisions in substance as alleged in subparagraphs (a) through (c) of this paragraph. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

73. Du Pont admits the allegations of this paragraph, except that du Pont is without knowledge or information sufficient to form a belief as to the truth of the allegation that the licensing contract was under and subject to all the provisions of the Contract of 1920. Du Pont avers that by express provision of the contract du Pont was not required to observe territorial restrictions and other provisions and limitations otherwise made applicable under the agreement to sublicensees of the parties.

74. Du Pont admits that Canadian Titan has not as yet erected a factory for the manufacture and sale of titanium compounds in Canada and that National sells titanium compounds to Canadian Titan. Except as to those facts specifically admitted, du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

85 75. Du Pont is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of this paragraph.

76. Du Pont denies knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the Contract of 1920; the alleged assignment by Titan, Inc., to Titangesellschaft; National's relations or agreements with Titangesellschaft after September, 1939, and the alleged refraining from competition or allotment of customers by the other defendants and alleged co-conspirators, and the supplying by National of Titangesellschaft customers in South America. Du Pont admits that by the 1933 contract it was given licenses under National's patents to sell in, among other places, South America, and that it and at least some of the defendants and alleged co-conspirators have shipped into South America. Except as to those facts specifically admitted, du Pont denies each and every allegation of this paragraph.

77. Du Pont denies each and every allegation of this paragraph.

WHEREFORE du Pont denies that the Plaintiff is entitled to the relief prayed for in the Complaint, or any part thereof, or to any other relief against du Pont, and prays for judgment dismissing the Complaint herein as to it with the costs and disbursements of this action.

CRAVATH, SWAINE & MOORE,

By WM. DWIGHT WHITNEY,

A Member of the Firm,

*Attorneys for E. I. du Pont de Nemours
and Company.*

*Office and Post Office Address: 15 Broad Street,
Borough of Manhattan, City of New York.*

Of Counsel:

GERHARD A. GESKELL,

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB.

September 15, 1944.

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EXHIBIT "A" TO ANSWER

THIS AGREEMENT made as of the first day of January, 1933, by and between THE TITANIUM PIGMENT COMPANY, INC., (hereinafter called Titanium), a corporation organized and existing under the laws of the State of Maine, and KREBS PIGMENT & COLOR CORPORATION (hereinafter called Krebs), a corporation organized and existing under the laws of the State of Delaware,

WITNESSETH:

WHEREAS, Titanium and Krebs are engaged in manufacturing and development activities within the Licensed Field as hereinafter defined and maintain research and development organizations for the purpose of expanding such activities; and

WHEREAS, Titanium and Krebs each owns certain United States Letters Patent and applications for United States Letters Patent relating to said Licensed Field which in the opinion of their respective counsel present causes of controversy in respect of claims of mutual infringement, and

WHEREAS, each of the parties hereto, in order to avoid such controversies, desires to acquire from the other party hereto a license of the character and scope and upon and subject to the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and of the covenants herein contained the parties hereto have agreed as follows:

ARTICLE I

The term "Licensed Field" wherever herein employed means and includes (1) all methods, processes and apparatus in the field of manufacture and use of all titanium compounds, containing two per cent. (2%) or more of the element titanium in a chemically, mechanically or physically combined state, and mixtures thereof, which can be used as pigments, whether or not adapted for other uses, and (2) all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses.

ARTICLE II

Titanium and Krebs each agrees to grant and hereby grants to the other an irrevocable and non-exclusive right and license, within the United States of America, its colonies and possessions, present and future, to use

87 all processes, methods and apparatus of manufacture now or hereafter during the term of this Agreement used by it and as to which it is free to grant

such rights, whether or not patented or subject to patent, and under and in accordance with any and all United States Letters Patent now or hereafter and during the term of this Agreement owned by it or otherwise at its disposal for the grant of licenses, relating to and within the limits of the Licensed Field, and to sell the products resulting from the use of such processes, methods and apparatus of manufacture, whether or not patented or subject to patent, throughout the United States of America, its colonies and possessions present and future, Mexico, Central America, the West Indies, and South America.

Notwithstanding the limitations of the Licensed Field as herein defined, it is understood and agreed that each of the parties hereto shall have the right to sell, within the licensed territory of sale specified in this Article, any and all intermediate products of manufacture under the license hereby granted whether or not such intermediate products are intended or adapted for use as pigments.

It is further understood and agreed that all purchasers from either of the parties hereto of any product, intermediate or final, of manufacture under the license hereby granted shall be privileged to use the product so purchased for any and all purposes.

Nothing in this article contained shall in any manner limit or restrict the right of either party hereto to grant to third parties licenses of the same character and scope as the license granted by it under this Article.

ARTICLE III

Each party hereto agrees, from time to time, during the term of this Agreement, to disclose to the other as promptly as may be practicable, full technical information with respect to all methods, processes, apparatus and products within the Licensed Field, including, when so requested, specifications and claims under any United States Letters Patent owned and under any application for United States Letters Patent filed or contemplated by it, and further to disclose to the other, from time to time, the results and aims of its research and development work in the Licensed Field, and improvements attempted or effected by it in methods, processes, apparatus and products of manufacture therein, to the end that all the knowledge and experience of each party in the Licensed Field shall be at the full disposal of the other within and for the territory of the licenses granted by this Agreement. It is understood and agreed that the

disclosures contemplated by this Article shall be made only by and to officials specially designated for the purpose in writing by the parties hereto respectively:

ARTICLE IV

Within two months after the end of each calendar year from January 1, 1933 to December 31, 1936, each party hereto shall pay to the other a royalty based upon the total quantity of merchantable Titanium Dioxide (excluding sweepings), free or in combination, made wholly or in part under United States Patents or Applications for United States Letters Patent of the other party, and produced and packed by it during the preceding calendar year, in the following respective amounts:

Krebs shall pay Titanium $2\frac{1}{2}\%$ of the value of the Titanium Dioxide produced and packed by it as aforesaid, valued at the average of Krebs' published carload price for standard Titanium Dioxide in bags for said year; and

Titanium shall pay Krebs 1% of the value of the Titanium Dioxide produced and packed by it as aforesaid, valued at the average of Titanium's published carload price for standard Titanium Dioxide in bags for said year;

Provided, however, that in no event shall the amount of royalty payable by either party under this Article for any year exceed the amount of royalty payable to it hereunder for the same year by more than \$10,000.

It is understood and agreed that no royalty shall be payable by either party to the other on Titanium Dioxide produced and packed subsequent to December 31, 1936.

ARTICLE V

Each party hereto agrees during the term of this Agreement to use its best efforts to assist the other to acquire, on terms as favorable as possible to the other, an irrevocable and non-exclusive right and license to manufacture, use and sell, within the limits of the Licensed Field, and within the territory of the licenses granted by this Agreement, under any United States Letters Patent and/

or application therefor owned by or otherwise at the disposal of other companies, firms or individuals, domestic or foreign, under which such party hereto itself is licensed.

Krebs further agrees that during the term of this Agreement it will offer to any foreign associate of Titanium that may be designated by Titanium, before offering to any other person, firm or corporation, the opportunity to acquire, upon mutually satisfactory terms and condi-

tions, and irrevocable, and non-exclusive license within the limits of the Licensed Field under any patent relating to the Licensed Field issued in any country of continental Europe or in Great Britain which now is or hereafter and during the term of this Agreement may be owned by or otherwise at the disposal of Krebs.

ARTICLE VI

This Agreement may be terminated and cancelled by either party at any time after December 31, 1933, upon three years' prior notice in writing to the other party, but such termination and cancellation shall not in any manner operate to terminate, restrict or impair the licenses theretofore acquired by either party from the other.

ARTICLE VII

Titanium and Krebs each hereby releases and forever discharges the other from any and all claims for infringement of any and all United States Letters Patent relating to the Licensed Field now owned by it or hereafter, during the term of this Agreement, acquired by it with the right to sue for past infringement.

Titanium and Krebs each hereby releases and forever discharges the customers of each other from any and all claims which it may now or hereafter be entitled to assert by reason of the use of Titanium Dioxide and Titanium compounds and mixtures prior to the date of this Agreement, in violation or infringement of the claims of any United States Letters Patent relating to the said Licensed Field.

ARTICLE VIII

This Agreement shall not be assignable by either party.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be executed, in duplicate, by their
90 duly authorized officers and their respective seals to be hereunto affixed as of the day and year first above written.

THE TITANIUM PIGMENT COMPANY, INC.,
By WM. F. MEREDITH, *President*.

Attest:
(S) J. D. MEREDITH, *Secretary*.

KREBS PIGMENT & COLOR CORPORATION,
By C. H. RUPPRECHT, *President*.

Attest:
(S) C. H. LYMAN, *Secretary*.

91 EXHIBIT "B" TO ANSWER

AGREEMENT

This agreement, made and entered into this 1st day of January, 1941, by and between NATIONAL LEAD COMPANY (hereinafter called NATIONAL), a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having a principal office and place of business in New York, New York, and E. I. DU PONT DE NEMOURS AND COMPANY (hereinafter called DU PONT), a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having a principal office and place of business in Wilmington, Delaware;

WITNESSETH,

WHEREAS, on January 1, 1933, THE TITANIUM PIGMENT COMPANY, INC., a corporation organized and existing under the laws of the State of Maine, and KREBS PIGMENT AND COLOR CORPORATION, a corporation organized and existing under the laws of the State of Delaware, entered into an agreement providing for the granting to each other of certain licenses under their respective inventions and within the "Licensed Field" defined in said agreement; and

WHEREAS, under an instrument dated January 1, 1936, by and between DU PONT, said TITANIUM PIGMENT COMPANY, INC., and said KREBS PIGMENT AND COLOR CORPORATION, DU PONT became assigned of and assumed all of the rights and obligations of the KREBS PIGMENT AND COLOR CORPORATION under said January 1, 1933 agreement without changing in any wise the scope or effect of said agreement, as more specifically provided for in said instrument;

WHEREAS, under an instrument dated October 31st, 1936, by and between NATIONAL, said TITANIUM PIGMENT COMPANY, INC., and DU PONT, NATIONAL became assigned of and assumed all of the rights and obligations of THE TITANIUM PIGMENT COMPANY, INC. under said January 1, 1933 agreement without changing in any wise the scope or effect of said agreement, as more specifically provided for in said instrument;

WHEREAS, NATIONAL and DU PONT, as the respective assignees under said agreement dated January 1, 1933 between THE TITANIUM PIGMENT COMPANY, INC., and KREBS PIGMENT AND COLOR CORPORATION, desire to amend the same;

✓

Now, THEREFORE, in consideration of the premises and the mutual promises, covenants and undertakings hereinafter set forth, it is hereby mutually agreed between NATIONAL and DU PONT that said January 1, 1933 agreement shall be and the same is hereby amended as follows, to-wit:

1. That Article I of said agreement be cancelled and in lieu thereof the following Article be substituted:

ARTICLE I

"The term 'Licensed Field', wherever herein employed shall be deemed to include (1) all methods, processes and apparatus in the field of manufacture and use of all titanium compounds containing two per cent. (2%) or more of the element titanium in a chemically, mechanically or physically combined state, and mixtures thereof, which can be used as pigments, whether or not adapted for other uses, and also inorganic extenders to be used in conjunction with such titanium compounds; and (2) all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses, and also inorganic extenders to be used in conjunction with such titanium compounds; provided, however, titanated lithopone shall not be deemed as included within said Licensed Field."

2. That the first paragraph of Article II of said agreement be canceled and that the following be substituted therefor:

"NATIONAL and DU PONT, during the term of this agreement, grant to each other, within the limits of said Licensed Field and as to which NATIONAL or DU PONT is or shall be free to grant such rights, an irrevocable and non-exclusive right and license, throughout the United States of America, its territories, colonies and possessions, present and future:

(a) under all original or reissue Letters Patent of the United States, now or hereafter owned or controlled by either party;

(b) under all applications for Letters Patent of the United States now or hereafter owned or controlled by either party and which have been pending for a period of at least six months from date of filing by either party; and

(c) under all pending applications for Letters Patent of the United States purchased or acquired by NATIONAL or DU PONT from third parties, after the lapse of a period of

six months' time from their date of filing; provided, however, that in event any such application shall be pending for more than six months or shall issue to patent prior to expiration of said six months' period, the license
93 herein provided for under any such application and/or patent shall be deemed to exist as of the date of such purchase or acquisition or the date of issue of said patent.

"It is understood and agreed that the rights vested in the parties hereto shall include the right to sell the products resulting from the use of any licensed process, method and apparatus of manufacture described in the licensed patents and/or applications, throughout the United States of America, its territories, colonies and possessions, present and future, Mexico, Central America, the West Indies, and South America."

3. That Article III of said agreement be canceled and in lieu thereof the following Article be substituted:

ARTICLE III

"Each party hereto agrees not later than six months from the date of filing any application for Letters Patent of the United States which either party may file, purchase or acquire for any invention within the Licensed Field to make full disclosure to the other of the specifications and claims under any such application. It is understood and agreed that the disclosures contemplated by this Article shall be made only by and to officials specifically designated in writing for that purpose by the respective parties hereto."

4. That Article V of said agreement be canceled and in lieu thereof the following Article be substituted:

ARTICLE V

"Each party hereto agrees during the term of this agreement to use its best efforts (but without any obligation to incur out-of-pocket expense) to assist the other to acquire, on terms as favorable as possible to the other, an irrevocable and non-exclusive right and license to manufacture, use and sell, within the limits of the Licensed Field and licensed territory, under any United States original or reissue Letters Patent, or under any application for United States Letters Patent or reissue which has been pending for a period of not less than six (6) months from its filing date, owned by or otherwise at the disposal of other companies, firms or individuals,

domestic or foreign, under which such party hereto itself is licensed.

94 "DU PONT further agrees that not later than six months after the filing date of any licensed application for Letters Patent of the United States it will offer to any foreign associate of NATIONAL that may be designated by NATIONAL, before offering to any other person, firm or corporation, the opportunity to acquire, upon mutually satisfactory terms and conditions, an irrevocable and non-exclusive license, within the limits of the Licensed Field aforesaid, under any application or patent relating to the Licensed Field filed or issued in any country of Continental Europe or in Great Britain, which now is or hereafter and during the term of this agreement may be owned by or otherwise at the disposal of DU PONT."

5. It is understood and agreed between the parties hereto that except as specifically modified hereinabove, each and all of the other provisions of said agreement of January 1, 1933 shall remain in full force and effect and that the amendment and cancellation herein provided for shall not in any manner operate to terminate, restrict or impair the licenses heretofore acquired by either party from the other under said January 1, 1933 agreement; that the licenses provided for in Article II of said agreement of January 1, 1933, as hereinabove amended, and excepting for the specific inclusion of inorganic extenders within the Licensed Field, shall not be construed as extending to or including any patent or application therefor which would not have been licensed by virtue of said January 1, 1933 agreement; that, further, the rights and obligations assumed by DU PONT herein shall not exceed those assumed by it under the above-mentioned January 1, 1936, assignment from Krebs to DU PONT; that the "Licensed Field", as herein defined, and the rights and privileges granted in pursuance hereof and said agreement of January 1, 1933 shall be subject to all conditions of the aforesaid assignments and shall not be deemed to include or apply to any methods, processes, apparatus, uses or products of DU PONT other than those which relate primarily to or come within the scope of the activities now regularly conducted by its Krebs Pigments Department; likewise, said Licensed Field and the rights and privileges granted in pursuance hereof and said agreement of January 1, 1933 shall be subject to all conditions of the aforesaid assignment and shall not be deemed to include or apply to any methods, processes, apparatus,

95 uses or products of NATIONAL other than those which relate primarily to or come within the scope of the activities now regularly conducted by its Titanium Division.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed, in duplicate, by their respective proper officers, duly authorized, and their respective corporate seals to be hereunto affixed as of the day and year first above written.

NATIONAL LEAD COMPANY,
By (S) FLETCHER W. ROCKWELL,
President.

Attest:
(S) H. O. BATES, Secy.

E. I. DU PONT DE NEMOURS AND COMPANY,
By (S) C. H. RUPPRECHT,
*General Manager,
Krebs Pigments Department.*

Attest:
(S) E. A. HOWARD, *Assistant Secretary.*

Form Approved
Legal Department
H. C. HASKELL, *Director.*

96. In United States District Court
[Title omitted.]

*Supplemental Answer of Defendant,
E. I. du Pont de Nemours
and Company*

The defendant, E. I. du Pont de Nemours and Company (hereinafter referred to as du Pont), for its supplemental answer to the complaint herein, avers that since the filing of du Pont's original answer to the complaint herein, du Pont has irrevocably removed from its titanium pigments licenses to American Zirconium Corporation and Virginia Chemical Corporation, respectively (referred to in paragraphs 62 to 64, inclusive, of the complaint), all provisions with respect to the maximum quantities of titanium dioxide to be produced by such licensees under their respective licenses. Such licensees have been notified

by letters, dated November 10, 1944, of the waiver of such conditions in their respective licenses.

CRAVATH, SWAINE & MOORE,
By WM. DWIGHT WHITNEY,
A Member of the Firm,
Attorneys for E. I. du Pont de Nemours
and Company.
Office and Post Office Address: 15 Broad Street,
Borough of Manhattan, City of New York.

Of Counsel:

GERHARD A. GESELL,
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB.

December 4, 1944.

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In United States District Court

[Title omitted.]

Plaintiff's Proposed Findings of Fact

JURISDICTION AND VENUE

1. The complaint is filed and the proceedings are instituted against the defendants to restrain and prevent violations by the defendants of Sections 1 and 2 of the Sherman Antitrust Act [DP and NL Answers, pars. 1]. The defendants National Lead Company (referred to herein as NL) and Titan Co., Inc. have their respective principal offices in the Southern District of New York [NL Answer, par. 1; DP Answer, pars. 2 and 3]. The defendant E. I. du Pont de Nemours and Company, Inc. (referred to herein as DP) has an office, transacts business, and is found within the Southern District of New York [DP and NL Answers, pars. 1].

99—2. The defendants DP and NL are engaged in the business of manufacturing, selling and transporting titanium pigments in commerce among the several states of the United States and between the United States and foreign nations [NL Answer, par. 23, DP Answer par. 33; Pl. 26, 44, 45; Tr. p. 3093-3095, 2593, 3350-3351].

100

DESCRIPTION OF DEFENDANTS

3. The defendant NL is a New Jersey corporation with its principal office and place of business at New York, New York, with assets in excess of \$100,000,000 [not denied in NL Answer; NL 32; DP Answer, par. 2]. NL

is the largest manufacturer of titanium pigments and compounds in the United States and the largest manufacturer of titanium pigments and compounds in the world [Complaint, par. 2, not denied in NL Answer] manufacturing and selling 76.5 per cent of composite and 46.4 per cent of pure TiO_2 in the United States in 1943 [Pl. 469, 470, 1207; DP 93; Tr. p. 2527]. NL conducted all its activities relating to the manufacture and sale of titanium pigments and compounds through Titanium Pigment Company, Inc. (referred to herein as TP) until its dissolution in 1936 and thereafter conducted such operations through its own Titanium Division [Complaint, par. 5, not denied in NL Answer].

101 4. The defendant NL owned approximately 87 per cent of the stock of Titan Co. A/S since December 31, 1927, and since January 1944 has owned or controlled approximately 99 per cent of said stock [Pl. 6].

102 5. The defendant NL owned 87 per cent of the stock of Titan Co., Inc. from the date of its incorporation to January 28, 1944, at which time it acquired and now owns 100 per cent of said stock [Pl. 6].

103 6. The defendant Titan Co., Inc. is a Delaware corporation, organized in 1929 with its office and principal place of business at New York, New York [NL Answer, par. 1; DP Answer, par. 3].

104 7. The defendant Titan Co., Inc. since its incorporation in 1929, acquired and now owns the following percentages of voting stock in the following named corporations:

BTP—44% [NL Answer par. 1; Pl. 5, 38]

TG—50% [NL Answer par. 1; Pl. 38]

SIT—57.638% [NL Answer par. 1; Pl. 5, 38]

TK—18.5% [NL Answer par. 1; Pl. 5, 38]

105 8. The defendant Titan Co., Inc. acquired most of the business assets of Titan Co. A/S and assumed all of the obligations of and was entitled to receive all the benefits of contracts Exhibits A, A-1, A-2, B, B-1, B-3, C, C-3, C-8 and other contracts of Titan Co. A/S in 1929 [Pl. D, Pl. 89, 90].

106 9. The defendant Titan Co., Inc. since its incorporation, owned a number of patents and has held exclusive licenses, with the right to grant sublicenses, under patents pertaining to the manufacture and use of titanium pigments and compounds [DP Answer, par. 3;

NL A. [NL Answer, par. 1; Pl. A, D]. A majority of Titan Co., Inc.'s officers and directors are and since its organization have been officers and directors of defendant NL [Pl. 7, 13, 21, 39, 50].

107. 10. The defendant DP is a Delaware corporation and is one of the largest chemical companies in the United States with assets in excess of \$1,000,000 [DP Answer, par. 4; NL Answer, par. 2]. The defendant DP is also one of the largest manufacturers of titanium pigments in the United States manufacturing and selling approximately 23.5 per cent of the composite pigments made in the United States and 45.1 per cent of the pure TiO_2 made in the United States in 1943. It is also the second largest manufacturer of titanium pigments and compounds in the world [DP Answer, par. 4; Pl. 471, 472, 469, 470, 1207; Tr. p. 2527]. The defendant DP conducted all its activities relating to the manufacture and sale of titanium pigments and compounds through Krebs Pigment & Color Corporation (referred to herein as Krebs) until January 1, 1936, after which time it conducted its titanium pigment activities through the Krebs Division of DP [DP Answer, par. 6; Pl. 260].

108. 11. TP was a Maine corporation organized in 1916 and was engaged in the manufacture of titanium pigments and compounds from 1920 until its dissolution in 1936 [DP Answer, par. 5; not denied in NL Answer]. In 1921 the defendant NL acquired approximately 30 per cent of the stock in said company and acquired other portions of its stock at various times thereafter until December 30, 1932 at which time NL owned all the stock of TP [Pl. 6]. NL controlled all the activities and policies of TP from 1920 until its dissolution in 1936 [NL Answer; Pl. 6, 7, 8, 21, 50] at which time all of the assets and liabilities of TP were taken over and its titanium business continued by the defendant NL as a division of NL [Pl. E2]. TP owned and was the exclusive licensee of many patents relating to the manufacture and use of titanium pigments and compounds, including the Barton, Rossie, Jebson patents and processes [Pl. 470]. TP manufactured composite pigments principally but manufactured a pure TiO_2 in the United States since 1928 [Tr. p. 3097-3098, 2787] in competition with Commercial Pigments Company (referred to herein as CP).

109. 12. Krebs was a Delaware corporation formed in July 1931 by the defendant DP, the Grasselli Chem-

ical Co. and the Commercial Solvents Corporation to acquire the business of the CP, the Krebs Pigment & Chemical Co. and the Grasselli Chemical Co. [DP Answer, par. 6; Pl. 195]. CP was the only one of the foregoing companies engaged in the manufacture and sale of titanium pigments and compounds prior to the acquisition of its business by Krebs [Pl. 177, print 625-626]. The defendant DP acquired a 70 per cent stock interest in Krebs at that time and committed itself to engage in the titanium pigment business only through Krebs [Pl. 195, print 765 at 782]. The defendant DP acquired the remaining 30 per cent of the stock of Krebs on December 31, 1934 [Tr. p. 3256]. On December 31, 1935 defendant DP acquired all the business of Krebs and assumed all the obligations of Krebs, thereafter operating the titanium pigment and compound business of said Krebs directly through the Krebs Division of the defendant DP [Pl. E-1]. Krebs continued to operate under the Blumenfeld patents and process after it acquired the business of CP in July 1931 [Pl. 472, par. 2]. It also acquired the right

110 to use all patents owned or thereafter acquired by TP or NL which related to the manufacture and use of titanium pigments in August 1933 [Pl. E]. It did not commence the manufacture of composite pigments until 1935 [Pl. 42, par. 16; Tr. p. 3259]. The defendant DP acquired the right to use such of the United States patents of NL's foreign associates which related to the manufacture of titanium pigments as it desired in 1938 [Pl. Q, R, S]. C. H. Rupperecht was a director and president of Krebs from its incorporation until its dissolution and was in charge of the titanium pigment operations of the defendant DP until his decease September 10, 1944 [Pl. 51]. Krebs also owned a substantial stock interest in Travancore Minerals Company, Ltd. which held rights in extensive ilmenite sand deposits in India [Pl. 196, print 784 at 838; Pl. 199].

114 13. CP was a corporation formed by Commercial Solvents Corporation in 1928 [Pl. 177, print 625 at 669]. It acquired the Blumenfeld and other patents in the United States relating to the manufacture and sale of titanium pigments and compounds and since 1928 was engaged in the manufacture of titanium pigments in the United States operating a plant at Baltimore, Md. [Pl. 175, 176, 177, 196; Tr. p. 669]. It manufactured a pure TiO_2 pigment only and sold it in competition with TP [Tr.

p. 2507]. Its business was acquired by Krebs in July 1931 [Pl. 195].

112 14. Titan Co. A/S was a Norwegian corporation with its principal place of business at Fredrikstad, Norway [NL Answer, par. 4; DP Answer, par. 7] and from some time prior to 1920 until about 1929 was engaged in the manufacture of titanium pigments and compounds in Norway [DP Answer, par. 7; NL Answer, par. 4; Pl. 469, 470; Tr. p. 2847]. Said Titan Co. A/S owned the Jebesen and other patents relating to the manufacture of titanium pigments and compounds [Pl. 470, par. 1] and also controlled through A/S Titania, large deposits of ilmenite in Norway [Pl. 72; NL Answer, par. 4]. It was authorized by TP to use the Barton, Rossi and other patents and processes relating to the manufacture and use of titanium pigments and compounds in 1920 [Pl. A]. Its activities and policies have been controlled by the defendant NL since 1927 [Tr. p. 2844-2844a, 2853]. It ceased the manufacture of titanium pigments and compounds in 1929 [Tr. p. 2846-2847, 2851]. Thereafter, substantially all titanium pigments and compounds sold by Titan Co. A/S in its exclusive territory were purchased from TG [Tr. p. 2847; Pl. C-8]. Titan Co. A/S continued to function as selling agency for defendant Titan Co., Inc. in part of the territory reserved to Titan Co., Inc. after 1929 [Tr. p. 2852].

113 15. The Interessengemeinschaft Farbenindustrie Aktiengesellschaft (referred to herein as IG) is a German corporation with its principal place of business in Frankfurt, Germany, and is one of the largest corporations in Germany and one of the largest chemical companies in the world [NL Answer, par. 5; DP Answer, par. 8; Tr. p. 2505, 3222].

114 16. Tütangesellschaft m.b.H. (referred to herein as TG) is a German corporation with its principal place of business at Leverkusen, Germany, and was organized in October 1927 by Titan Co. A/S and IG [NL Answer, par. 6; DP Answer, par. 9; Pl. C, C-1 to C-9 inclusive] and is the largest producer of titanium pigments and compounds in Europe [Pl. 1207; Tr. p. 2527]. TG is licensed to use the Barton, Rossi, Jebesen patents and processes and owns and is licensed to use other patents relating to the manufacture and use of titanium pigments [Pl. C-3, Art. II; Pl. 470]. TG has a right to use some of the DP patents relating to the manufacture and

use of titanium pigments and compounds [Pl. M, N, Q, R, S].

115 17. Societe Industrielle du Titane (referred to herein as SIT) is a French corporation with its principal place of business at Paris, France [NL Answer, par. 7; DP Answer, par. 10]. It received a license from Titan Co. A/S in 1927 to manufacture titanium pigments and compounds in France under the Barton, Rossi, Jebsen patents [Pl. B, B-1, B-3, B-4]. No factory was ever erected by the said company to manufacture titanium pigments or compounds in France [Tr. p. 2844]. In 1927 defendant NL purchased a controlling interest in SIT [Pl. 61, 62, 64, 65, 66, 71]. SIT has a right to use some of DP patents relating to the manufacture and use of titanium pigments and compounds [Pl. M, N, Q, R, S].

116 18. Imperial Chemical Industries, Ltd. (referred to herein as ICI) is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, and is the largest manufacturer of chemicals in the British Empire with assets in excess of £100,000,000 [DP Answer, par. 11; NL Answer, par. 8; Tr. p. 3223].

117 19. Goodlass Wall and Lead Industries, Ltd. (referred to herein as GW) is a corporation organized under the laws of the United Kingdom with its principal office and place of business in London, England, and is the largest producer of lead and lead pigments in the British Empire [NL Answer, par. 9; DP Answer par. 12].

148 20. Imperial Smelting Corporation (referred to herein as ISC) is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business in London, England, and is one of the largest producers of pigments in the British Empire [DP Answer, par. 13; not denied in NL Answer].

119 21. British Titan Products, Ltd. (referred to herein as BTP) is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Billingham, England [DP Answer, par. 14; NL Answer, par. 10; Pl. F], and was registered in August 1930 by ISC with the knowledge and approval of the defendants NL and Titan Co., Inc. [Pl. 144, 145]. BTP is the largest manufacturer of titanium pigments and compounds in the British Empire [DP Answer, par. 14; NL Answer, par. 10; Pl. 1207]. BTP is licensed to use the Barton, Rossi, Jebsen patents

and processes and owns and is licensed to use other patents relating to the manufacture of titanium pigments and compounds [Pl. F-1]. BTP also has a right to use some of the DP patents relating to the manufacture and use of titanium pigments and compounds [Pl. M, N, Q, R, S].

120 22. ICI, GW, and ISC subscribed to and each own 17 per cent of the stock of BTP and acquired said stock on or about the time said BTP commenced active operations in the titanium pigment and compound business in the British Empire in February 1933 [Pl. F].

121 23. National Titanium Pigments, Ltd. (referred to herein as Laporte) is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Luton, England, and is the only other producer of titanium pigments and compounds in the British Empire and manufactures titanium pigments and compounds under the Blumenfeld patents and process in England [NL Answer, par. 11; DP Answer, par. 15; Pl. 614; Tr. p. 2503-4; 2929].

122 24. Canadian Industries, Ltd. (referred to herein as CIL) is a corporation organized and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada, and is the largest chemical manufacturer in Canada [NL Answer, par. 12; DP Answer, par. 16]. Approximately 43 per cent of its stock is and has been owned by the defendant DP since 1928 and approximately 43 per cent of its stock is and has been owned by ICI since 1928 [DP Answer, par. 16; Pl. 645].

123 25. Canadian Titanium Pigments, Ltd. (referred to herein as CTP) is a corporation organized in January 1937 and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada [NL Answer, par. 13; DP Answer, par. 17; Pl. K]. Defendant NL has since the incorporation of CTP owned 49 per cent of the stock of CTP [Pl. K; Pl. 6]. The balance of the stock is owned by CTP [DP Answer, par. 17; NL Answer, par. 13]. CTP is the only company engaged in the titanium business in Canada and owns and/or is licensed to manufacture and use the Blumenfeld, Barton, Rossi, Jebson and other patents relating to the manufacture and use of titanium pigments and compounds in Canada [Pl. K; K-3, K-4]. Said CTP is not now manufacturing titanium

pigments and compounds in Canada but purchases all of its requirements for sale in the Dominion of Canada from the defendants NL and DP [NL Answer, par. 60; DP Answer, par. 74; Pl. 45, 685]. NL is required to supply the requirements of CTP on a cost plus basis until CTP commences the manufacture of titanium pigments or compounds [Pl. 685].

124 26. Kokusan Kogyo Kabushibi Kaisha (referred to herein as KK) is a Japanese organization and is the largest manufacturer of paints in Japan and is a subsidiary of Nippon Sangyo, one of the largest industrial enterprises in Japan [DP Answer, par. 18; NL Answer, par. 14; Pl. 622; Tr. p. 2903].

125 27. Titan Kogyo Kabushiki Kaisha (referred to herein as TK) is a Japanese organization existing under the laws of Japan with its office and principal place of business in Tokyo, Japan [NL Answer, par. 15; DP Answer, par. 19]. TK was organized in 1936 by Titan Co., Inc., IG, TG, TR, and Thann & Mulhouse [Pl. J, J-1]. Approximately 50 per cent of the stock of TK has been owned by KK since its organization, 18½ per cent by Titan Co., Inc., 16½ per cent by IG, and 15 per cent by TR and Thann & Mulhouse [NL Answer, par. 1; Pl. J, Pl. 38]. TK is the largest manufacturer of titanium pigments and compounds in Japan [NL Answer, par. 15; DP Answer, par. 19], owns many patents relating to the manufacture and use of titanium pigments and compounds, and is licensed to use the Barton, Rossi, Jebson, Blumenfeld patents and processes in the Japanese Empire [Pl. J-3, J-4]. TK also has a right to use some of the DP patents relating to the manufacture and use of titanium pigments and compounds [Pl. Q, R, S].

126 28. Societe de Produits Chimiques des Terres Rares (referred to herein as TR) is a French corporation with its principal place of business at Paris, France, and acquired the Blumenthal and other patents relating to the manufacture and use of titanium pigments and compounds in or about the year 1920 [DP Answer, par. 21; not denied in NL Answer to par. 21; Tr. pp. 2502-3; Pl. 121].

127 29. Fabriques de Produits Chimiques de Thann et de Mulhouse (referred to herein as Thann) is a French corporation with its office and principal place of business at Paris, France, and is the only manufacturer of titanium pigments and compounds in France [Tr. p. 2503; NL Answer, par. 16; DP Answer, par. 22; Tr. p.

2540]. It manufactures such pigments and compounds under the Blumenthal patents and process.

128 30. Societa Anonima Titanium is an Italian corporation with its office and principal place of business at Milan, Italy, and is a subsidiary of Montecatini, the largest manufacturer of chemicals in Italy, and is referred to herein as Montecatini [NL Answer, par. 17; DP Answer, par. 23; Tr. p. 2505, 2528]. Montecatini is the only manufacturer of titanium pigments and compounds in Italy and is licensed to use the Blumenfeld patents and process [Tr. p. 2505; NL Answer, par. 17].

129 31. Verein fur Chemische and Metallurgische Produktion Aussig (referred to herein as Aussig) is a corporation organized under the laws of Czechoslovakia with its office and principal place of business at Prague, Czechoslovakia [DP Answer, par. 24; NL Answer, par. 18]. It is the largest chemical company in Central Europe and is the only manufacturer of titanium pigments and compounds in Czechoslovakia and is licensed to use the Blumenfeld patents and processes [Tr. p. 2505, 2506, 2503, 2528].

130 OTHER UNITED STATES COMPANIES REFERRED
TO IN THE COMPLAINT

32. American Zirconium Corporation (referred to herein as Zirconium) is a subsidiary of the Glidden Co. and sells and ships TiO_2 from its Baltimore, Md. factory into other states in the United States [DP Answer, par. 34; NL Answer, par. 25]. Zirconium owned certain patents relating to the manufacture of titanium pigments and compounds prior to 1934 [Pl. 352, 361, 368; Pl. H print at 254]. It was licensed to use certain TiO_2 patents by DP on August 19, 1935 by license agreement dated January 1, 1935 [Pl. I]. Zirconium was licensed by NL to use certain of its patents relating to the manufacture of titanium pigments and compounds on May 6, 1935 [Pl. H]. The license from the defendant NL to Zirconium was cancelled on March 9, 1944 [NL 29]. Zirconium manufactures only pure TiO_2 [Tr. p. 3254]. It produced less than 5 per cent of the total production of TiO_2 produced in the United States in 1943 and for prior years [Tr. pp. 3254, 3255; Pl. 470, 472, par. 7].

131 33. Virginia Chemical Corporation (referred to herein as VC) is a subsidiary of Inter-chemical Company and sells and ships TiO_2 between some of the

states of the United States [NL Answer, par. 26; DP Answer, par. 35]. VC was organized in 1935 to manufacture titanium pigments [Pl. 407-412, 427]. It owned certain patents relating to the manufacture and use of titanium pigments and compounds [Pl. 411, 414, 415, 427, 430]. The defendant DP licensed VC to use certain of its TiO_2 patents on August 5, 1937 [Pl. L]. VC produces only pure TiO_2 [Tr. p. 3253] and produced less than 5 per cent of the total production of TiO_2 in the United States in 1943 and prior thereto [Pl. 470, 472; Tr. p. 3253].

132 NATURE OF TRADE AND COMMERCE INVOLVED

34. Titanium pigments and compounds are manufactured from titanium which is the ninth most abundant element on the earth's surface [Tr. pp. 136a-137; DP Answer, par. 26; NL Answer, par. 19]. Titanium pigments and compounds are possessed of great opacity, hiding power and chemical inertness, and are largely displacing other pigments such as lithopone and white lead [DP Answer, par. 26; NL Answer, par. 19]. Titanium pigments are used in the manufacture of paints and are also used in the manufacture of rubber, glass, paper, vitreous enamels, and many other products [DP Answer, par. 26; NL Answer, par. 19; Tr. p. 164]. The production of titanium pigments in the United States has risen from 100 tons in 1920 to approximately 110,000 tons in 1943 with a peak production of approximately 128,000 tons in the United States in 1941 [Tr. pp. 3253-3255; Pl. 470, 472, par. 7; DP Answer, par. 26; NL Answer, par. 19]. The total production of titanium pigments and compounds outside of the United States has shown similar growth, the estimated foreign production of titanium pigments and compounds being approximately 1,000 tons in 1920 and approximately 23,000 tons in 1938 [Pl. 1207; Tr. pp. 2526-7].

133 35. Practically all of the patents relating to the manufacture of titanium pigments and compounds and used in the manufacture of titanium pigments and compounds on a commercial basis are process patents [Pl. 450-468, 473-474, 1229; NL 2, 3, 4, 5, 6, 7]. Prior to 1930 all of the principal producers of titanium pigments and compounds in the world were divided into two groups, the NL group and the Blumenfeld group [Pl. 208, 278; Tr. pp. 2504, 2918]. The NL group included TP, Titan Co A/S, SFT, TG, Titan Co., Inc. and were

using principally the Barton, Rossi, Jebsen patents and processes for the manufacture of titanium pigments and compounds. Each of the companies named had been allocated exclusive marketing territories throughout the world by agreements [Pl. A, B, C and D.]. Most of the Barton and Rossi patents were and are owned either by TP or NL [Pl. 470, 1229, NL 2 and 3]. Most of the Jebsen patents were and are owned by Titan Co. A/S [Pl. 470; NL 4]. The important Barton and Rossi and Jebsen patents related principally to the manufacture of composite pigments and had expired at the end of 1934 [NL 2, 3 and 4; Pl. 69, 70, 177, print 625, at 626, 206]. The Blumenfeld group consisted of TR, Thann, Aussig, Montecatini, and Commercial Pigments Co. to each of which companies TR had allocated exclusive territories throughout the world [Tr. p. 2502, 2507, 2508; Pl. G, G-1, G-3]. Substantially all of the patents issued in the titanium pigment field after 1936 related to improvements on processes theretofore used in the manufacture of titanium pigments and compounds and resulted principally in the production of improved titanium pigments [NL 2-7; Pl. 1229; Tr. p. 2765.] The validity of none of the patents relating to the manufacture of titanium pigments or compounds was ever passed upon by any court of record in the United States [Tr. pp. 3255-3256]. All of the companies engaged in the manufacture of titanium pigments and compounds in the United States on a commercial basis, use the sulphuric acid process disclosed in the Barton, Rossi, Jebsen and Blumenfeld process [Tr. pp. 2777-2779].

135 36. The Auer Company developed a process for the manufacture of titanium pigments and compounds in Germany in the early 1920's but ceased manufacturing in 1931 [Pl. 304-321, 249, 253]. The Auer patents were acquired in November 1932 by Krebs [Pl. 310].

136 37. TP owned approximately 67 United States patents and 22 patent applications relating to the manufacture and use of titanium pigments and compounds on January 1, 1933. It also had the right to use by exclusive license 34 United States patents and 13 patent applications of its foreign associates. TP owned 229 patents in 24 foreign countries prior to January 1, 1933. TP used only 25 patents and patent applications out of a total of 136 patents and patent applications (18 per cent)

which it owned or had the right to use prior to January 1, 1933 [Pl. 470].

137 38. NL now owns or controls 75 United States patents and 28 patent applications relating to the manufacture and use of titanium pigments and compounds and has exclusive licenses on 2 Titan Co. A/S, 18 Titan Co., Inc., 17 IG and 1 TG patent and 4 TG patent applications. It also owns 3 patents in Canada and has non-exclusive licenses on 7 patents in South and Central American countries. NL is also licensed to use 156 DP patents and 30 DP applications and is accordingly entitled to use approximately 269 United States patents and 63 applications. It uses only 66 patents and applications out of a total of approximately 332 which it owns or has the right to use or approximately 20 per cent [Pl. 470].

138 39. Krebs owned approximately 30 United States patents and 24 applications relating to the manufacture and use of titanium pigments and compounds and owned no foreign patents or applications prior to January 1, 1933. Krebs used a total of 18 such patents and applications or approximately 33 per cent of the total which it had the right to use. DP now owns approximately 174 United States patents and 32 applications. It also owns 48 patents and 14 applications in Canada, 13 patents and 9 applications in England, 20 other patents in 7 other countries including 8 in Japan. It is licensed to use 96 patents and 27 applications of NL or its foreign associates in the United States. It accordingly now owns or has the right to use approximately 270 United States patents and 59 applications. It uses approximately 70 such patents and applications or about 20 per cent [Pl. 472].

139 CONTRACTS WITH NL FOREIGN ASSOCIATES

40. TP entered into a contract dated July 30, 1920 with Titan Co. A/S as alleged in paragraph 40 of the complaint [NL Answer, par. 30; DP Answer, par. 40; Pl. A]. This contract divided the world into exclusive territories allocated to Titan Co. A/S and TP in which territories said companies were to confine their activities in the titanium pigment business to the exclusion of any competition from the other party within the exclusive territory allocated to each company under said contract [Pl. A, Art. II, III, VI, XIV, Pl. 245; Tr. pp. 2912-14, 2830]. The territory allocated to TP was North America and the

territory allocated to Titan Co. A/S was the rest of the world exclusive of South America in which both companies were permitted unrestricted operations [NL Answer, par. 30; Tr. p. 2832; Pl. A, Art. II, III, IV]. This contract also provided that each company was to grant to the other exclusive licenses in their respective territories on all its then owned and future patents, secret processes, apparatus and technical information or "know-how" relating in any way to the manufacture or use of
140 titanium pigments and compounds within the limits of the licensed field as defined in said contract [Pl. A, Art. II, III, VII, X; Tr. pp. 2824-25, 2827, 2831-32, 2837]. This contract is still in effect and cannot be terminated until 1956 [Pl. A, Art. X].

141 41. Simultaneously with the execution of the contract Exhibit A, defendant NL entered into a contract with Titan Co. A/S and TP [Pl. A-1]. NL agreed to respect the provisions of contract Exhibit A and to promptly assign to TP all patents, inventions and improvements relating to titanium pigments or compounds which it then used or might thereafter acquire or whichever should be at its disposal throughout the world. The contract Exhibit A is to run until 1956 [Pl. A, Art. XI].

142 42. Each party to contract Exhibit A agreed not to export titanium pigments or compounds into the other's territory without its consent [NL Answer, par. 30; Pl. A, Art. II, III, IV; Tr. pp. 2829-32, 2913-14]. Each party agreed to prevent the importation into the other party's territory of finished articles as defined in the agreement if the importation of such finished articles interfered in any way with the sales of titanium pigments or compounds by the other party in its own territory [Pl. A, Art. VI; Tr. p. 2835]. Each party was allowed to grant licenses of its own patents or sublicenses of patents exclusively licensed to it by the other party, provided the sublicensee agreed to grant to the other party to the contract an exclusive license under the present and future patents of the licensee or sublicensee relating to the manufacture of titanium pigments or compounds for the territory of such other party, and provided also that such licensee or sublicensee would agree to comply with the restrictions on exports and sales in the territory of such other party to the contract [Pl. A] as was imposed on the respective parties to said contract [Pl. A, Art. XIV; NL Answer,
143 par. 30; Tr. pp. 2839, 2914-15]. The obligations of TP under this contract were assumed by NL in 1936

[Pl. E-2; Complaint, par. 43, no reply by NL]. The obligations of Titan Co. A/S under this contract were assumed by Titan Co., Inc. in 1929 [Pl. D; NL Answer, par. 36].

144 43. The intended purpose and effect of the defendant NL in entering into the contract of 1920 [Pl. A, A-1] was to prevent competition in titanium pigments and compounds between the parties to the said contract. The intended purpose and effect of the acquisition of control of Titan Co. A/S by NL was to utilize Titan Co. A/S and the contract of 1920 to further control competition in the manufacture of titanium pigments and compounds in all markets of the world including the United States. The defendant NL and Titan Co. A/S agreed to have Titan Co. A/S and subsequently defendant Titan Co., Inc. form in each of the important industrial countries of the world, in association with any corporation or firm contemplating the manufacture and sale of titanium pigments and compounds and threatening to be a serious competitor of NL and Titan Co. A/S, new companies in which NL or Titan Co. A/S were to have a part interest. Any new company so formed was to be given certain territory in which it would have the exclusive right to manufacture and sell titanium pigments and compounds free from any exports into said territory by NL. The new company so organized was to refrain from competing with NL

145 in its territory (the United States and other countries of North America) or into the territory of any other company associated with NL. Titan Co. A/S and subsequently defendant Titan Co., Inc. were to make said contracts providing for the formation of the new companies and NL was to be bound to adhere to all of the territorial restrictions placed on Titan Co. A/S and subsequently defendant Titan Co., Inc., in such contracts by virtue of contract Exhibit A. All the present and future patents belonging to NL or Titan Co. A/S or any of the companies associated with either in the formation of such new companies, as well as those of the new companies to be organized, were to be licensed exclusively to NL for North America and to the new companies to be organized for their respective exclusive territories and to Titan Co. A/S and subsequently defendant Titan Co., Inc. for the rest of the world [Pl. 69, 72, 74, 75, 61, 62, 63, 245; Pl. B, C, D, F, J, K; Tr. p. 2912].

146 44. On or about March 3, 1927 Titan Co. A/S entered into a written contract [Pl. B, B-1, pr. 100a;

NL Answer, par. 31] under which Titan Co. A/S allocated France and its territories, except those appurtenant to the territories of North and South America, to SIT as its exclusive territory in which to engage in the titanium pigment business [Pl. B, Art. II, pr. 31; NL Answer, par. 31]. SIT assumed all the obligations imposed upon Titan Co. A/S by Exhibit A for the territory allocated to SIT and was entitled to receive all of the benefits for this territory to which Titan Co. A/S was entitled by Exhibit A [Pl. B, print 29 at 30; NL Answer, par. 31; Pl. A, Art. XIV]. This contract Exhibit B is still in effect and cannot be terminated until 1951 [Pl. B, Art. X].

147 45. Prior to 1927 IG was engaged in development work preparatory to commencing the manufacture and sale of titanium pigments and compounds in competition with NL and Titan Co. A/S in all markets of the world [Pl. 77, 78, 79; Tr. p. 2845]. NL and Titan Co. A/S entered into negotiations with IG in 1927 and in or about October 1927 nine separate contracts, described in paragraph 45 of the complaint, were entered into [NL Answer, par. 33; Pl. C, C-8, 64-68, 71, 76-84]. Titan Co. A/S entered into a contract with IG to create TG [Pl. C-1; NL Answer, par. 33]. IG agreed to engage in the titanium pigment business only through TG and Titan Co. A/S agreed not to engage in the titanium pigment business in the territory allocated to TG except through TG. TG was to confine its manufacturing and selling operations to the exclusive territory allocated to it by Titan Co. A/S, to wit, Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Rumania, Serbia, Croatia, Slovenia, Bulgaria, Greece, Turkey, Japan, China and Spain. Titan Co. A/S was granted the rest of the world as its territory [NL Answer, par. 33; Pl. C, par. 2; C-3, pars. 1(e), 1(f) Art. IV]. IG agreed to grant exclusive licenses to TG on all patents it then owned or thereafter acquired,
148 secret processes, apparatus and technical information relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract [NL Answer, par. 33; Pl. C-2, par. 1]. Titan Co. A/S was given the right to acquire such titanium pigments and compounds as it desired for sale in its territory from TG at cost [NL Answer, par. 33; Pl. C-8, par. 1]. Such pigments or compounds so purchased by Titan Co. A/S could only be sold outside TG's territory [Pl. C-3, Art. IV; NL Answer, par. 33]. Titan Co. A/S granted an exclusive license to TG

of all its then owned or thereafter acquired patents, secret processes, apparatus and technical information relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract, for use in the territory assigned to TG [Pl. C-3, Art. II; NL Answer, par. 33]. TG granted to Titan Co. A/S for its territory (the rest of the world exclusive of the territory allocated to TG) an exclusive license of its then owned or thereafter acquired patents, secret processes, apparatus and technical information relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract [Pl. C-3, Art. III;

149 NE Answer, par. 33]. Both TG and Titan Co. A/S agreed not to export titanium pigments into the territory of the other party without its consent and to impose the same obligations upon their customers [Pl. C-3, Art. IV; NL Answer, par. 33]. TG and Titan Co. A/S agreed not to import into the territory of the other party finished articles manufactured by it and to prevent the importation of finished articles by customers purchasing titanium pigments or compounds from it, if the importation of such finished articles interfered in any way with the sale of titanium pigments and compounds by the other party in its own territory [Pl. C-3, Art. II, III, IV]. Both Titan Co. A/S and TG were allowed to grant licenses of their own or licensed patents provided the licensee or sublicensee agreed to grant to the other party to the contract (Titan Co. A/S or TG) an exclusive license under all such licensee's or sublicensee's present and future patents relating to the manufacture and sale of titanium pigments or compounds for the territory of such other party (Titan Co. A/S or TG) and provided further that such licensee or sublicensee agreed to respect the exclusive territory of such other party and to assume the same obligations

150 imposed by contract Exhibit C-3 on both Titan Co. A/S and TG with respect to imports and sales into each other's territory. This contract is to run until 1957 and is automatically renewable for 10-year periods thereafter and has not been cancelled [Pl. C-1, par. 9; C-3, Art. VI(g); NL Answer, par. 33]. After the execution of the contract Exhibit C, TG erected a factory for the manufacture of titanium pigments at Leverkusen, Germany [Pl. C-4; Pl. 101; Tr. p. 2851].

151 46. Prior to 1933, ICI, GW, and ISC were planning to engage in the manufacture of titanium pig-

ments and compounds in Great Britain, and ICI had begun development work preparatory to engaging in the manufacture and sale of titanium pigments and compounds [Pl. 76, 92, 93, 94, 95, 96, 98, 99, 101, 103, 105, 106, 109, 111, 113, 114, 122, 129, 144, 163; Tr. p. 2864]. Defendants NL and Titan Co., Inc. were engaged in selling titanium pigments in Great Britain since 1928 [Pl. 92, print 325 at 327; 100; Tr. p. 2856]. NL and Titan Co., Inc. entered into negotiations with ICI, GW and ISC to create BTP through which NL, Titan Co., Inc., ICI, GW, and ISC would engage in the titanium pigment business in the British Empire (exclusive of North America) [Pl. 104-107, 108, 109, 110, 111, 112, 113, 114, 116-120, 122A, 671; Tr. pp. 2856, 2863, 2867]. Defendant Titan Co., Inc. on or about March 1933 entered into the contracts described in paragraph 50 of the complaint [Pl. F-F-6]. NL and Titan Co., Inc. agreed that they would not conduct any operations relating to the manufacture and sale of titanium pigments and compounds within the British Empire as defined in said agreements except through BTP and ICI, ISC and

152 GW agreed to conduct any of their operations, relating in any way to the manufacture and sale of titanium pigments and compounds, through BTP exclusively [NL Answer, par. 38; Pl. F, pars. 1, 11; F-1, Art. I]. BTP was to confine all its operations relating to the manufacture and sale of titanium pigments and compounds to the British Empire, exclusive of any portions thereof appurtenant to North and South America [Pl. F, par. 1; F-1, Art. I; NL Answer, par. 38]. ICI, ISC, and GW agreed to transfer to BTP all their present and future patents relating in any way to the manufacture and sale of titanium pigments and compounds [Pl. F-2; NL Answer, par. 38]. Titan Co., Inc. granted BTP an exclusive license for the manufacture and sale of titanium pigments and compounds in the territory allocated to BTP under all its then owned or thereafter acquired patents, secret processes, apparatus and technical information relating in any way to the manufacture or use of titanium pigments and compounds, as defined within the limits of the licensed field in said contract [Pl. F-1, Art. II; NL Answer, par. 38]. BTP granted Titan Co., Inc. for the territory of Titan Co., Inc. (the rest of the world) a similar exclusive license of its present and future

153 titanium pigment patents, secret processes, apparatus and technical information [Pl. F-1, Art. III; NL Answer, par. 38]. Both BTP and Titan Co., Inc.

agreed not to export any titanium pigments or compounds into the territory of the other without its consent, and further agreed to impose the same obligation upon its customers [Pl. F-1, Art. IV; NL Answer, par. 38]. Each party agreed not to import into the territory of the other finished articles manufactured by it, and further agreed to prevent such importation by customers purchasing titanium pigments or compounds from it if the importation of such finished articles interfered in any way with the sale of titanium pigments or compounds by the other party in its own territory [Pl. F-1, Art. II, III, IV]. Each party was allowed to grant sublicenses within its territory provided that neither party could grant licenses under its own patents or under any patents licensed to it under contract Exhibit F-1 unless the licensee or sublicensee agreed to grant to the other party to the contract (BTP or Titan Co., Inc.) an exclusive license under all the present and future patents of such licensee or sublicensee relating to the manufacture and sale of titanium pigments or compounds for the territory of such other party (Titan Co., Inc. or BTP) and unless the licensor (BTP or Titan Co., Inc.) required the licensee or sublicensee to agree to respect the territory of the other party and to impose upon such licensee or sublicensee all of the obligations imposed upon the other party (BTP or Titan Co., Inc.) with respect to the territory of the other in its contract Exhibit F-1 [NL Answer, par. 38; Pl. F-1 Art. VI, XIV]. Titan Co., Inc. transferred to BTP all of its British Empire titanium pigment business pursuant to said contract [Complaint, par. 51—No reply by NL; Pl. F-3, F-4]. The contract Exhibit F-1 is to run until 1963 and is still in effect [NL Answer, par. 38; Pl. F, par. 13]. The defendant DP had knowledge of the negotiations between ICI and Titan Co., Inc. which culminated in contracts Exhibits F to F-6, inclusive, and waived its rights under its patents and process agreements with ICI to enable ICI to take a stock interest in BTP [Pl. 220, 221, 223, 224, 229, 231, 234, 276-278, 282, 283]. TG supplied BTP with titanium pigments for its markets until BTP constructed a factory [Pl. 577, 676; Pl. F, par. 12, F-6]. BTP erected a factory for the manufacture of titanium pigments at Billingham and BTP became the largest manufacturer of titanium pigments in the British Empire [Tr. p. 2870; Pl. 1207; complaint, par. 51—No reply by NL].

47: Prior to 1936 local Japanese companies were planning to manufacture and sell titanium pigments

and compounds in Japan [Pl. 292-294, 615, 616, 617, 618, 619]. NL, Titan Co., Inc., IG, and TG believed that such Japanese companies would engage in exports which would lead to competition in all the markets of the world including the United States [NL Answer, par. 61; Pl. 617, 618]. Titan Co., Inc., TG, IG, TR, Thann, K.K. and Doitsu as trustee for Titan Co., Inc., IG, TG, TR, and Thann entered into agreements as alleged in paragraph 75 of the complaint [Pl. 615-624, J-8; NL Answer, par. 61]. TK was created as a result of these contracts for the exclusive purpose of engaging in the titanium pigment business in the Japanese Empire [Pl. J, par. 1, J-1, pars. 1, 2; NL Answer, par. 61]. TK was assigned the Japanese Empire as its territory and the rest of the world was assigned to Doitsu as trustee for Titan Co., Inc., TG, IG, TR, Thann [Pl. J-2, print 294 at 297; NL Answer, par. 61]. TK was granted an exclusive license for its territory to manufacture and sell titanium pigments and compounds under all Doitsu's then owned or thereafter acquired secret processes, apparatus and technical information relating in any way to the manufacture of or use of titanium pigments and compounds, as defined within the limits of the licensed field in said contracts [Pl. J-2, par. 1; J-4, pars. 1, 2; NL Answer, par. 61]. TK granted Doitsu, as agent for Titan Co., Inc., TG, TR and Thann, a similar exclusive license of its present and future titanium pigment patents, secret processes, apparatus and technical information relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract [Pl. J-4, pars. 1, 3; NL Answer, par. 61]. Both TK and Doitsu agreed not to import titanium pigments and compounds into the territory of the other without its consent and agreed to impose the same obligations upon its customers [Pl. J-2, par. 1(e), J-4, par. 4; NL Answer, par. 61; Pl. 633, 634]. TK and Doitsu agreed not to import into the territory of the other finished articles manufactured by it and agreed to prevent such importation by customers purchasing titanium pigments or compounds from it if the importation of such finished articles interfered in any way with the sales of titanium pigments by the other party in its own territory [Pl. J-2, par. 1(f), J-4, pars. 2(b), 3(b), 4; NL Answer, par. 61]. TK was prohibited from granting sublicenses [Pl. J-4, par. 2; NL Answer, par. 61]. Doitsu was permitted to

grant sublicenses under any patents licensed to it by TK provided the sublicensee of Doitsu agreed to grant to TK for its territory an exclusive license under all present and future patents of the licensee or sublicensee relating to the manufacture and sale of titanium pigments and compounds, and provided Doitsu required the licensee or sublicensee to agree to respect the exclusive territory of TK and to assume the same obligations with respect to TK's territory as were imposed on Doitsu [Pl. J-4, par. 3(a); NL Answer, par. 61]. This contract Exhibit J-1 is to run until 1960 and is uncanceled [Pl. J-1, par. 8; NL Answer, par. 61]. TG supplied the Japanese market with titanium pigments until the Japanese factory commenced production [Pl. 618-626; Tr. p. 2915].

159 48. Contract Exhibit A allocated the Canadian and North American markets to NL as part of its exclusive territory [Pl. A, Arts. I, III]. Prior to the year 1934 Laporte was interested in erecting a factory in Canada to manufacture titanium pigments [NL Answer, par. 58; Pl. 533, 644]. NL and DP were selling titanium pigments and compounds in the Canadian market at this time [Pl. 40, not pr.; 45, not pr., 648-659]. DP was obligated to give to CIL the use of its Canadian patents relating to the manufacture of titanium pigments by agreement with ICI [Pl. 169-170, 186, 188, 645-647]. The consent and approval of DP and ICI as owners of the controlled stock interest in CIL were required for any agreement between NL and CIL for the Canadian territory [Pl. 647, 678, 663]. NL and CIL with the knowledge and approval of DP and ICI negotiated and entered into contracts described in paragraphs 72 and 73 of the complaint for the purpose of creating CTP [DP Answer, par. 72; NL Answer, par. 58; Pl. K-K-3, Pl. 45, not pr., 644-670, 674-682, 687-691]. NL and CIL agreed in Exhibit K to organize CTP. CTP was to confine its activities relating to the manufacture and sale of titanium pigments and compounds to Canada as its exclusive territory
160 [DP Answer, pars. 72, 73; NL Answer, pars. 58, 59; Pl. K, par. 1, K-1, Art. I (f)]. NL agreed to conduct all of its operations relating to the manufacture and sale of titanium pigments and compounds in Canada through CTP and CIL agreed that it would not conduct any such operations anywhere in the world except through CTP [DP Answer, pars. 72, 73; NL Answer, pars. 58, 59; Pl. K, par. 11]. CIL agreed to grant an exclusive license

to CTP under all patents then owned or thereafter acquired by it relating to the manufacture or use of titanium pigments or compounds [NL Answer, par. 58; DP Answer, par. 72; Pl. K-2]. NL agreed to transfer its Canadian titanium pigment business to CTP [Pl. K, par. 3, K-3]. NL entered into contract Exhibit K-1 with CTP and granted to CTP an exclusive license on all of NL's patents or processes which it then owned or might thereafter acquire relating to the manufacture of titanium pigments or compounds for the exclusive use of CTP in its exclusive territory [Pl. K-1, Art. II; DP Answer, par. 73; NL Answer, par. 59]. NL was allocated the rest of the world as its territory in contract Exhibit K-1 [Pl. K-1, Art. I (g); DP Answer, par. 73; NL Answer, par. 59]. CTP granted to NL an exclusive license to manufacture and sell titanium pigments and compounds on all patents and processes then owned or thereafter acquired by CTP for NL's territory provided that NL was to grant to DP a non-exclusive license for North and South America under any such patents licensed to NL by CTP [DP Answer, par. 73; NL Answer, par. 59; Pl. K-1, Art. III]. NL and CTP agreed not to export titanium pigments or compounds into the territory of the other without the consent of the other party and agreed to impose the same obligation upon its customers [DP Answer, par. 73; NL Answer, par. 59; Pl. K-1, Art. IV]. NL agreed not to export into CTP's territory any finished articles manufactured by NL [DP Answer, par. 73; Pl. K-1, Art. III; NL Answer, par. 59]. NL and CTP could grant sublicenses but neither party could grant licenses under its own patents or under any patents licensed to it under Exhibit K-1, unless the licensee agreed to grant to the other party to the contract (NL or CTP) an exclusive license under all its present and future patents relating to the manufacture or use of titanium pigments or compounds for the territory of such other party (CTP or NL) and unless such licensor (CTP or NL) compelled the licensee or sublicensee to agree to respect the territory allocated to the parties to the contract (CTP or NL) in Exhibit K-1 with respect to each other's territory [DP Answer, par. 73; NL Answer, par. 59; Pl. K-1, Art. XIV]. The contract is to run until 1967 and is still in effect [Pl. K, par. 13; DP Answer, par. 73; NL Answer, par. 59]. CTP acquired all of the titanium pigment business of Laporte in Canada in 1937 and said Laporte agreed to refrain from engaging in the titanium

pigment business in Canada until 1952 [Pl. K-4, 62] BTP, NL and DP jointly supplied the Canadian market until 1939 [Pl. 45, not pr., 685, 1029]. Since 1939 CTP has acquired its products from DP and NL and will continue to do so until it builds a factory [Pl. 45, not pr., 685, 686]. DP sold its titanium pigment products in Canada prior to the creation of CTP through CIL and since the creation of CTP entirely through CTP [Pl. 45, not pr.]. Canadian prices for titanium pigments are based on United States prices and titanium pigments are sold in Canada below American prices [Pl. 656-659, 677, 683, 684].

163 49. The defendants NL and Titan Co., Inc. and their foreign associates agreed in 1939 to extend their obligation to exchange patents, present and future, which in any way related to the titanium pigment business, to titanium compounds and to other matters related to the titanium pigment business outside the licensed field, as defined in various contracts on a reciprocal basis [Pl. O, K-5; Pl. 812-818, 692-713, 718].

164 50. Each and every patent application of NL and NL's foreign associates SIT, TG, BTB, TK, CTP, which related to the licensed field as defined in the various agreements, was immediately available to each other on an exclusive royalty-free basis under their respective agreements for the respective territories in which the companies operated throughout the world [Pl. 553, 719-735, 741-799, 807, 811, 959-961, 971]. The expense of filing and securing said applications and patents were paid for by the exclusive licensee in whose territory the application was filed [Pl. 721-725, 746-751, 759-761, 775, 799-803, 804-806, 809, 810].

165 51. After the outbreak of the present war in 1939 NL, Titan Co., Inc., and TG believed that if the United States should be at war with Germany and as a consequence the United States Alien Property Custodian should seize the United States patents owned by TG and the German equivalent of the Alien Property Custodian should seize the German patents owned by Titan Co., Inc. that if such patents were licensed to outsiders there might be competition in the respective markets allocated to the parties to Agreements A and C. NL, Titan Co., Inc., TG, and TG in order to prevent such potential competition decided that all of the United States patents owned by TG should be transferred to Titan Co., Inc. and the Titan Co., Inc. patents in the exclusive territory of TG as defined in Exhibit C-3 should be transferred to TG provided that

none of the other provisions of the several contracts were to be affected in any way. Thereupon TG and IG assigned to Titan Co., Inc. some of its United States patents and applications and Titan Co., Inc. endeavored to transfer all of its German patents and other patents in TG's territory, to TG [Pl. 1103-1200]. Included among the patents and applications transferred to TG to Titan Co., Inc. in 166 the United States were the rutile pigment patents and applications licensed by Titan Co., Inc. to DP in 1940 [Pl. 1117, 1121, 1229, patents no. 2303305, 2303306, 2303307; Pl. R]; the two patents 2224987 (application 283986) and 2260177 (application 300004) which DP admitted were used by it in producing grades of TiO_2 accounting for 35 per cent of its TiO_2 sales [Pl. 945, 1120].

167 52. Defendants NL and Titan Co., Inc. and their foreign associates TG, BTP, TK and CTP exchanged complete technical information which in any way related to the manufacture or use of titanium pigments or compounds as defined within the limits of the licensed field in their various agreements. Such information was of inestimable value in developing the business of the associated companies to the exclusion of potential newcomers in competition in the industry [Pl. 588, 589, 1210, 144, 620, 621, 635, 636, 637, 638, 639, 640, 641, 642, 592-713, 718, 738-740].

168 53. The defendants NL and Titan Co., Inc. and their foreign associates TG, BTP and SIT exchanged full and complete information relating to the sales prices of titanium pigments and the activities of any other companies and potential competitors engaged in the titanium business in any of the markets of the world. Prices for the various markets in Europe were frequently fixed for all titanium pigments below which none of the associated companies were to sell in their respective markets without immediate notice to Titan Co., Inc. [Pl. 825-834].

169 64. Each and all of the various contracts [Pl. A, B, C, F, J, K] has had the intended effect of (1) preventing competition among the various parties to said contracts within the exclusive territories allocated to the parties in their respective contracts; (2) creating a world-wide patent pool of many of the patents of commercial value relating to the manufacture of titanium pigments and compounds within the licensed field, as defined in said

agreements in which said patents are made available only to the parties to said contracts; (3) creating a world-wide pool of useful technical information, relating to the manufacture and use of titanium pigments, available only to any of the parties to said contracts within their respective exclusive territories; (4) enabling the parties to said contracts outside the United States to control the production and prices of all titanium pigments and compounds produced within their respective exclusive territories [Pl. 70, 79, 85, 87, 88, 112, 114, 183, 245, 530, 544, 552, 575, 576, 578, 583-592, 627-629, 631, 632, 643, 660, 714-717, 819, 820, 821, 822, 823, 824, 839, 1041, 1209, 1212; Tr. pp. 2592, 2618, 2912-16].

170

CONTRACTS OF NL'S FOREIGN ASSOCIATES
WITH THE BLUMENFELD ASSOCIATES

55. The only companies other than TG producing titanium pigments on the continent of Europe in 1933 were the Blumenfeld companies, TR, Thann, Aussig and Montecatini [Tr. pp. 2504-6; 2917; Pl. 208, 287]. These companies were in competition with TG and BTP in the markets allocated to them by contracts Exhibits B, C, F and were importing titanium pigments into the United States [Tr. pp. 2880-2895; Pl. 208, 287, 514, 519, 523, 530, 538, 539].

171

56. On November 10, 1933 TG and Aussig entered into a contract to divide and allocate the titanium pigment business in Germany, Czechoslovakia, Poland, Austria, Russia, Hungary, Yugoslavia and Rumania between TG and Aussig [Pl. G]. This territory had previously been granted Aussig by TR in a contract entered into on or about the year 1922 [Tr. p. 2503; Pl. G, Art. I, print 173 at 174; Pl. 287], and was part of the territory allocated to TG by Titan Co. A/S in contract C-3. Prices for all titanium pigments or compounds to be sold under this agreement were to be fixed by joint action of all parties thereto [Pl. G, Art. IV]. Each party was given the right to use the other's titanium pigments patents on a royalty-free basis [Pl. G, Art. X] and was to refrain from giving any technical information or aid to potential competitors [Pl. G, Art. IX]. Aussig was required to purchase any of its requirements under the contract, in excess of Aussig's then productive capacity, from TG [Pl. G]. Said contract was in effect from July 1, 1933 and is uncanceled and the effect of the war on

its operation is undetermined [Tr. pp. 2891-2; Pl. G, Art. XIV; Pl. 550].

172 57. Defendant Titan Co., Inc., SIT, Thann and

TR entered into the Contrat a Quatre [Pl. G-1] in June 1935 but the quotas established therein were effective from May 1934 [Article 15]. It provided for the allocation of the titanium pigment business within the respective exclusive territories allocated to SIT in Exhibit B and by TR to Thann Pl. 287; [Tr. p. 2503]. The titanium pigment business was allocated between the parties to Exhibit G-1 on a quota basis in their respective exclusive territories [Pl. G-1, Arts. 1, 2, 10, see also Pl. G-2, print 212 at 221]. Sales prices were to be fixed by mutual consent [Pl. G-1, Art. 5]. All parties were authorized to use each other's titanium pigment patents royalty-free [Pl. G-1, Art. 11]. All parties were to refrain from giving any technical information or aid to potential competitors [Pl. G-1, Art. 10]. No new factories were to be built in the countries of the agreement outside France without the mutual consent of all parties [Art. 12]. Said contract was supplemental to Exhibit G-3, the Contrat a Six [Pl. G-1, Arts. 15, 17]. Portions of this contract were suspended by the outbreak of hostilities in Europe in

September 1939, but the parties to said contract
173 Exhibit G-1 cooperated in supplying each other with the requirements of titanium pigments whenever conditions permitted until the occupation of said territory by German forces prevented further cooperation [Tr. pp. 2524-25].

174 58. The defendant Titan Co. Inc. and TR, Thann and SIT entered into a "Contract of Delivery" in June 1935 which provided for the purchase by Titan Co., Inc., SIT, TR, and Thann of their requirements of titanium pigments and compounds for the territories covered by agreement G-1, from TG and the Thann factories in excess of the then capacity of their respective manufacturing plants [Pl. G-2]. Any goods delivered under this contract were not to be exported from the countries for which they had been ordered and delivered. The buyer was required to impose similar obligations on his customers [Pl. G-2, print 212 at 221]. Portions of this contract were suspended by the outbreak of hostilities in September 1939, but the parties to said contract Exhibit G-2 cooperated in supplying each other with their requirements of titanium pigments whenever conditions permitted until the occupation

of said territory by German forces prevented further cooperation [Tr. pp. 2524-25].

175 59. The defendant Titan Co., Inc. entered into "Contrat a Six" [Pl. G-3] with TG, SIT, Thann, TR and Montecatini, in June 1935, providing for the division of the titanium pigment business in the respective markets allocated to the parties to the contract on a quota basis. The quotas established were effective as of May 1, 1934 [Art. 11]. Each of the parties to contract Exhibit G-3 agreed to assist each other in preventing third parties from entering the titanium pigment business within their respective territories and each of the parties to contract Exhibit G-3 agreed not to reexport titanium pigments or products from the territories for which they have been ordered and delivered [Pl. G-3, Art. 2]. Sales prices were to be fixed by mutual agreement [Pl. G-3, Art. 6]. Patent rights were exchanged between the parties on a royalty-free basis [Pl. G-3, Art. 8]. Said contract Exhibit G-3 was in effect until December 31, 1938 when it was cancelled by Montecatini [Pl. 576A]. The intention to continue to cooperate was expressed by the parties to contract Exhibit G-3 after its cancellation [Pl. 550, 551, 576A]. Further cooperation was suspended by the creation of a state
176 of belligerency between some of the parties to said contract with the outbreak of war in Europe in September 1939 [Pl. 576; Tr. p. 2894].

177 60. BTP entered into a price agreement with Laporte in 1934 covering the sale of titanium pigments for the British Empire [Pl. 826, print 2871 at 2873; Pl. 825, print 2878 at 2893; Pl. 576A, print 2170 at 2172; Pl. 593-98]. Said price agreement is still in effect but has no application to the Canadian market from which Laporte withdrew in 1937 [Pl. K-4]. In 1941 BTP and Laporte also entered into a quota agreement whereby a quota of the titanium pigment business in the British market was allocated to each of the said parties, which agreement is still in effect [Pl. F-8; NL Answer, par. 57; Pl. 599-614]. Laporte is obligated to refrain from exporting titanium pigments to any territory outside of the British Empire and has refrained from making such exports outside the British Empire since 1937 [Pl. 605, 606, 829, 830].

178 61. Each and all of the said contracts, Exhibits G, G-1, G-2, G-3, F-8, has had the intended effect of enabling the parties thereto to (1) completely monopolize and control the titanium pigment business and the

markets therein within their respective territories provided for in said contracts; (2) prevent the natural expansion and development of the manufacturing facilities of the respective parties to said contracts; (3) eliminate all competition in titanium pigments and compounds in the exclusive territories theretofore allocated Titan Co. A/S and Titan Co., Inc.; and (4) prevent any exports of titanium pigments or compounds from the territories allocated to the parties to said contracts [Pl. 86, 125, 167, 183, 200, 208, 226, 513-519, 522-544, 545-549, 552-575, 576A, 576B, 592-614].

179

CONTRACTS BETWEEN AMERICAN PRODUCERS

62. Defendants NL and Titan Co., Inc. and T.G. represented by Jebson, McCarty and Kühne, commenced negotiations with Commercial Pigments Co. and the other Blumenfeld companies represented by Blumenfeld, Ticknor, Chase and Burton, to eliminate competition between the two groups producing titanium pigments in all markets of the world in 1930 [Pl. 123-125, 127, 129, 130-133, 142, 144-148, 150, 151, 154-156, 158-161, 183, 163-168, 518, 522-530, 200, 1203; Tr. p. 2511]. No agreement eliminating competition between the two groups in markets outside of the United States could be reached unless a similar agreement was reached in the United States between the defendant NL and CP [Pl. 122A-144, 148, 151, 154-156, 159, 161, 163-165, 208, 279; Tr. pp. 2516, 2830]. A tentative understanding had been arrived at between NL's foreign associates and the Blumenfeld interests outside the United States in March 1931 subject to an agreement being reached between the two United States producers TP and CP [Pl. 208; Tr. p. 2511].

180

63. After the purchase of CP by Krebs in July 1931, defendant NL represented by Jebson, McCarty, Thompson and Beschorman, and DP represented by Rupprecht, Ticknor and Chase, continued negotiations to reach a world-wide agreement which would eliminate competition in the manufacture of titanium pigments and compounds and which would give control and domination of the manufacture and sale of titanium pigments and compounds in the United States to NL and DP [Pl. 193, 200, 202, 203, 210, 211, 214, 216, 242, 243, 249, 250, 1203; Tr. pp. 2516, 3260-61]. Blumenfeld continued to represent the Blumenfeld group. An agreement among the two groups engaged in the titanium pigment business outside the United States continued to be dependent upon an agree-

ment being reached between NL and DP in the United States [Pl. 200, 203, 208, 217, 234, 278, 537; Tr. p. 2516, 2561, 2583].

181 64. DP knew of the plans to combine all the

European titanium producers and was willing to give its aid to NL in bringing about an agreement among the European producers in order to secure one in the United States with NL [200-203, 208, 217, 218, 223, 224, 226, 229, 234, 211, 248, 249, 250, 253, 534-536, 537, 307, 309, 313, 1203]. DP and NL wished to pool all their patents and technical information relating to the manufacture or use of titanium pigments in the United States in order to jointly control and dominate the manufacture and sale of titanium pigments and compounds and to eliminate all competition therein in the United States markets [Pl. 206, 210, 211, 245, 246, 278, 280, 281, 284, 304; Tr. pp. 1512-1530]. NL had threatened but failed to file suit on any claims it may have had for any alleged infringements of patents owned or controlled by it against CP prior to July 1, 1931 [Pl. 124, 126, 127, 133-137, 143, 152, 153, 162; Tr. p. 3255]. DP investigation of all United States patents relating to the manufacture or sale of titanium pigments prior to its acquisition of CP showed that the patents NL subsequently alleged were infringed, were either not valid or could be avoided at a slight additional expense [Pl. 190, 192]. The

defendant DP knew at the time it acquired the business of CP in July 1931 that NL had failed to enforce any claim it might have against CP for any alleged infringement of any patents relating to the manufacture and sale of titanium pigments or compounds which were owned and controlled by TP [Pl. 177, print 625 at 677; Pl. 196, print 784 at 811]. Both NL and DP agreed not to contest the validity of any of their patents [Pl. 210, 211, 228, 233, 238]. Both NL and DP denied infringement of any patents and the patents alleged to be infringed were of doubtful validity [Pl. 222, 225, 233, 235-7]. NL advised DP of its contracts with Titan Co. A/S in May of 1932 and of the restricted nature of said license agreements [Pl. 211, 250]. TP did not own the legal title to 7 of the 9 patents it claimed were infringed by Krebs in 1932 [Pl. 214, 450-456, not pr.; 470]. Krebs did not check the legal title to the patents NL alleged it infringed [Pl. 254]. Both TP and Krebs began to exchange full and complete technical information relating to the manufacture and use of titanium pigments in 1932 and the information so exchanged was unrelated to any alleged claims of patent

infringement by either company [Pl. 210, 212, 1219-1228]. Blumenfeld and his foreign associates furnished technical aid and assistance to Krebs at its request from 183 August 1931 until the approximate date at which TP and Krebs commenced the exchange of technical information in 1932 [Pl. 843, 1206A, 1206B; Tr. p. 2514]. Krebs did not clearly repudiate any obligation to Blumenfeld or TR under their contract with CP until after contract Exhibit E had been approved by NL's foreign associates and executed by TP and Krebs [Pl. 843, 843A, 843B, 1205, 1206, 1206A, 1206B, 286].

184 65. Contract Exhibit A prevented TP from entering into contract Exhibit E unless Krebs agreed not to export into the exclusive territories of NL's foreign associates and unless Krebs agreed to grant exclusive licenses to NL's foreign associates of all its present and future titanium patents for their respective exclusive territories [Pl. A, Art. XIV; Pl. 211, 262-266].

185 66. The defendant DP in order to secure the agreement it desired in the United States with TP (Exhibit E) orally agreed with NL, TP and NL's foreign associates not to export into the exclusive territories of NL's foreign associates and that such licenses as would be granted to NL's foreign associates under paragraph 5 of Exhibit E would be exclusive in fact [Pl. 203, 242, 243, 244, 245, 246, 248, 250, 255, 267-271, 263-266, 273-275, 277, 278, 279, 287, 288, 290, 857, print 2983 at 2986, 507, 510, 839, 884, 887, 944, 1000; Pl. 45, not pr.]. DP orally agreed with Blumenfeld that it would not export into the territories of the Blumenfeld companies outside the United States and Blumenfeld acting on behalf of the Blumenfeld companies and interests agreed that they would not import into the United States [Pl. 534; Tr. pp. 2516-2523, 2561, 2574, 2581; 2583, 2585; P. 45 not pr.]. DP assured NL of its intention to engage in the titanium pigment business exclusively through Krebs prior to the execution of Exhibit E [Pl. 260, 887, print 3056 at 3064]. Contract Exhibit E was approved by NL's foreign associates and executed by DP and NL on August 28, 1933 [Pl. 279, 507, 510]. DP and NL were the only two companies producing titanium pigments in the United States at the time this agreement was entered into. Krebs at all times observed said oral understanding and agreements [Pl. 45, not pr.].

186 67. Contract Exhibit E provided for the full and complete exchange of technical information be-

tween NL and DP, [Article III] and full and complete exchange of present and future patents of either company, relating to the manufacture of titanium pigments within the licensed field on a royalty-free basis. Said contract also restricted the sale of titanium pigments by DP to the United States, Central and South America [Article II, Tr. p. 2356]. Contract Exhibit E only released each of the parties from alleged infringement of claims of patents owned by them at the time of the execution of the agreement or thereafter acquired during the term of said agreement with the right to sue for past infringement [Article VII].

187 68. Defendant DP acquired all the assets of Krebs on or about January 1, 1936 and assumed all its obligations including Exhibit E and the obligations under the oral agreements and understandings entered into with representatives of NL, its foreign associates, TP, Titan Co., Inc. and Blumenfeld [DP Answer, par. 6; Pl. E-1]. DP has at all times since January 1, 1936 observed said oral agreements and understandings [Pl. E-1, Pl. 45, not pr.; Pl. 664, 1009].

188 69. Blumenfeld's foreign associates, TR, Aussig, Thann, Montecatini, observed the oral agreement of 1933 and imported no titanium pigments or compounds into the United States after the oral understanding entered into between Krebs and the Blumenfeld associates in July 1933 [Pl. 93, 538; Tr. p. 2618-2623].

189 70. Zirconium had secured patents relating to the manufacture of titanium pigments in 1933 from the Glidden Company and Metal & Thermit Corporation and was about to commence the manufacture of titanium pigments in 1934 [Pl. 352, 361-368; Pl. H, print 251 at 254]. Zirconium was notified by the defendants NL and DP that such manufacture might involve infringement of the respective titanium pigment patents owned or controlled by TP, NL, Krebs or DP [Pl. 350, 353-355, 359]. Defendants DP and NL licensed some of their titanium pigment patents to Zirconium [Pl. H, I; Pl. 356, 357, 359, 360, 369]. The defendants NL and DP acting through Rupprecht and Beschorman discussed the respective licenses proposed to be granted to Zirconium by both companies prior to the granting of such licenses and agreed to eliminate any competition from Zirconium in the United States by DP licensing only some of their patents and restricting Zirconium production of all titanium pigments. [Tr. pp. 2608, 2616-17]. NL was to eliminate any threat of com-

petition to the foreign producers by restricting Zirconium exports [382 Pl. 1009, print 3287 at 3288; Tr. p. 2608, 2609, 2616, 2617] DP restricted the production of titanium pigments under its license to Zirconium and required Zirconium to pay a royalty on all titanium pigments produced by Zirconium whether produced under its license with DP or not [Pl. I; DP Answer, par. 63; Pl. 360, 369, 376, 377, 390, 391, 393, 394, 395, 398, 399, 400, 401, 402; Tr. p. 3254]. NL required Zirconium to refrain from exporting any titanium pigments produced by it outside the United States and required it to grant exclusive licenses to the foreign associates of NL of Zirconium patents [Pl. H, Pl. 378-381, 361-364, 371]. NL agreed to exchange technical information relating to the manufacture of titanium pigments with Zirconium in its license to Zirconium [Pl. H, Pl. 383-389, 404; Tr. p. 2801]. Zirconium was frequently refused technical information by NL on the ground that it had prior commitments to DP and NL's foreign associates [Pl. E, Pl. 383-389, 403, 404]. Contract Exhibit H was cancelled and mutual releases exchanged on the 9th of March 1944 after an indictment was returned against NL and DP for the alleged violation of the antitrust laws on June 28, 1943 [S.D.N.Y. Crim. 114-455; Pl. 405-406; NL 29]. The defendant DP collected a total of \$196,655.86 in royalties from Zirconium [Pl. 46, not pr.]. Zirconium issued to defendant NL 10 per cent of its stock in lieu of any cash royalty and defendant NL was represented on the board of directors of Zirconium by the president of NL [Pl. H-1; Tr. p. 3131]. Zirconium purchased 275 tons of titanium pigments from NL and 4394 tons from DP since the issuance of the licenses to it by NL and DP [Tr. pp. 3252, 3253]. DP eliminated the restrictions on the production of titanium pigments by Zirconium on November 10, 1944 [DP 53, 56]. There is no evidence in the record that the removal of these restrictions has resulted in increased production of titanium pigments by Zirconium.

71. VC was organized in 1935 to manufacture titanium pigments in the United States [Pl. 407-412, 427]. It was notified by NL and DP respectively of the possibilities of alleged infringement by it of the respective patents of NL and DP which related to the production of titanium pigments [Pl. 407, 408, 412, 413, 421, 428, 429, 430, 431, 432; Tr. pp. 2610-2612]. VC owned some patents relating to the manufacture of composite pigments but refrained from the manufacture of composite

pigments and manufactured only titanium dioxide [Tr. pp. 3253-3254; Pl. 411, 414, 415, 427, 430]. VC accepted a license to manufacture titanium dioxide under some of DP's titanium dioxide patents in 1937 with restrictions imposed upon its production [Pl. I, Pl. 414, 415, 417-420, 422, 423, 425, 426, 427, 436, 438-440]. NL deemed it inadvisable to have an oral agreement with a company not well known to NL's foreign associates that would obligate VC not to export and never made a license agreement with VC [Pl. 433-435, 437, 442]. It failed to institute any court action against VC to enforce its claim theretofore made against VC of alleged infringement of its patents relating to the manufacture of titanium pigments [Pl. 441; Tr. pp. 2610, 2613, 2789, 2790, 3255, 3256; Pl. 1229]. The restrictions imposed upon the amount of titanium dioxide which VC could produce under its license with DP were removed by DP in November 1944 [Pl. L; DP 5-55]. There is no evidence in the record that the removal of other restrictions has resulted in the increased production of titanium pigments by VC. VC paid \$193,875.24 in royalties to DP from the date of its license from DP to July 1, 1944 [Pl. 47, not pr.].

194 72. All patents and patent applications owned or filed by TP, NL, Krebs or DP which in any way related to titanium pigments or compounds as defined in the licensed field of contract Exhibit E, were immediately available to each other on acquisition or filing on a royalty-free basis from August 1933 to January 1, 1941 [314, 315, 317, 320, 321, 338, 339, 340-349]. From and after January 1, 1941 all United States patent applications of either NL or DP were made available and still are available for the use of the other company after six months from the date of the filing of applications [Pl. E-3, Art. I-2(b) Art. III]. All United States patents issued to or acquired by either DP or NL within the licensed field from and after January 1, 1941 continued to be and still are available to either company on a royalty-free basis immediately on issue or acquisition [Pl. E-3, Art. I-2(A)].

195 73. Defendants NL and DP jointly purchased the Leuchs patent relating to the manufacture of titanium pigments [Pl. 322-334]. Title to said patent was taken in the name of NL and thereafter assigned to DP who granted NL a non-exclusive license thereunder. Although NL had believed the patent to be invalid [Pl. 323, 324, 325] the patent was reissued with broader claims

[Pl. 329, 330, 473, 474].. Said patent was never used by either DP or NL [Pl. 470, 472].

196 74. DP and NL exchanged full and complete technical information relating to any manner to the manufacturing or use of titanium pigments or compounds from about April 1932 until April 1940 at which time this practice of exchanging technical information was terminated by DP on the ground that such exchange of technical information might be a violation of the Sherman Antitrust law [Pl. 285, 302, 475-503, 1219-1228; Tr. pp. 2784, 2791-3]. The defendants DP and NL cooperated in the acquisition of ilmenite and furnishing of pigments to each other [Pl. 122A, 149, 150, 166, 295-301].

197 75. NL granted DP the right to use certain "Micronizing Apparatus" necessary to the manufacturing of fine grade of titanium pigment on the same terms and conditions as those granted to NL under its exclusive license from International Pulverizing Corporation [Pl. P-1]. The license from NL to DP was granted at about the same time NL secured an exclusive license from International Pulverizing Corporation to use this apparatus [Pl. P, P-1]. DP admitted that this apparatus was necessary to enable it to make a pigment comparable to one produced by NL by the same apparatus [DP 68, 69, 74, 75]. Zirconium was granted the right to use this apparatus about eighteen (18) months later on the same terms and conditions as was granted DP [Pl. P-2, 443, 444]. NL refused a license of the "Micronizing Apparatus" to VC and Sherwin-Williams Company, who also desired to use this apparatus [Pl. 445, 449].

198 76. Contract Exhibit E was amended on January 1, 1941 to eliminate the exchange of technical information by NL and DP and the licensed field was specifically broadened to include extender pigments theretofore included by implication and practice between NL and DP [Pl. E-3, 493-495, 497-512]. The contract Exhibit E as amended is still in effect [Pl. E-3, Art. V-5, DP Answer, 60; NL Answer, 47]. DP continued to observe and adhere to the oral understandings and agreements entered into in 1933 after said amendment and did not export outside the Western Hemisphere [Pl. 45, not pr., Pl. 507].

199 77. The intended effect of the 1933 DP and NL contract Exhibit E, Exhibit E-3, and oral understanding of 1933, has been to enable DP and NL to jointly dominate and control the titanium pigment business in the United States; to eliminate all competition in the United

States between the American producers of titanium pigments [Pl. H, I, L, P; P-1, Q, R, S; Pl. 26, 44, not pr., 24, 42, not pr., 40, 470, 472, par. 7; Tr. pp. 2618-2621, 3097-3105, 3109, 3113; 3114, 3254, 3255]; and to restrict DP exports in titanium pigments to the Western Hemisphere [Pl. 45, 374, 375]; to enable the defendant NL to enter into contracts, Exhibits K, K-1; to enable the defendant Titan Co., Inc. to enter into contracts Exhibits G-1, G-2, G-3, J; to enable TG to enter into contract Exhibit G. [Pl. 278, Tr. pp. 1512-1530]; and to prevent the imports of titanium pigments into the United States except with the consent of the defendants NL and Titan Co., Inc. [Tr. pp. 2592-2599, 2618-2623].

200

DP-TITAN CONTRACTS

78. The contract between Blumenfeld, TR, and CP provided for the exchange of future patents and technical information relating to the manufacture and use of titanium pigments between CP, TR, and its associated companies engaged in the manufacture and sale of titanium pigments outside the United States [Pl. 175, 176]. Krebs disclaimed any obligation to TR and Blumenfeld under the CP, TR, Blumenfeld contract [Pl. 286, 843, 843A, 843B, 1205, 1206, 1206A, 1206B].

201

79. After the execution of Exhibit E, representatives of DP and NL's foreign associates enjoyed the privilege of visiting each other's titanium pigment plants and obtaining any and all technical information desired by either as regards plant operations and plant equipment from August 1933 to September 1938 [Pl. 290, 480-483, 486, 512, 862]. At that time the exchange of any technical information relating to matters of research involving titanium pigments was expressly terminated by DP as DP and NL were not exchanging such technical information [Pl. 891-893]. The exchanging of technical information between DP and NL's foreign associates as limited in September 1938 continued until the exchange of all technical information and experience was terminated between DP and NL in May 1940 [Pl. E-3, 495, 497-503, 512].

20

80. DP had no foreign patents or applications which related to the manufacture or use of titanium pigments or compounds in any of the territories of NL's foreign associates prior to 1934 [Pl. 472]. Article V of Exhibit E gave NL's foreign associates the first right to secure licenses on any foreign patents relating to the

manufacture or use of titanium pigments which DP might secure in the territory of the foreign associates of NL. Such licenses were subject to negotiations as to royalties to be paid to DP by NL's foreign associates for such licenses. Article V of Exhibit E also provided that NL would use its best efforts to secure similar rights for DP on any patents and applications licensed to NL in the United States by its foreign associates which related to the manufacture or use of titanium pigments [Pl. 337].

203 81. DP's first offer to NL's foreign associates of a license under Article V of Exhibit E covered a "blended" pigment application and was filed by DP in 1934 [Pl. 835-842]. This was the only titanium pigment patent filed by DP in the territory of NL's foreign associates without their specific request for such filing [Pl. 911, 952-955, 957]. The royalties asked by DP of NL's foreign associates for its proposed license were unsatisfactory [Pl. 838]. DP withdrew its blended pigment application and permitted the foreign associates of NL to file a new application in DP's name in such territories of NL's foreign associates as its foreign associates desired [Pl. 845-852]. DP granted royalty-free licenses to NL's foreign associates on such applications [Pl. M, 854-861]. All expenses of filing and securing patents issuing on said applications were paid by NL's foreign associates [Pl. 863, 864, 952-955]. The reservations of DP in license agreement Exhibit M were never made use of and said license was exclusive in fact [Pl. 857, 876].

204 82. The foreign associates of NL desired a general arrangement covering the exchange of patents between DP and themselves in order to eliminate the details of negotiating licenses of specific patents in specific agreements as required by Article V of Exhibit E [Pl. 823, 838-842, 844, 847, 853-884; Tr. pp. 3058, 3062]. Krebs did not wish to enter into a general cross-licensing agreement with the foreign associates of NL until it was reasonably certain that it would have no further difficulties with TR and Blumenfeld under their contract with CP [Pl. 843, 844].

205 83. Negotiations continued between DP, NL and its foreign associates for a general cross-licensing arrangement [Pl. 872; Tr. pp. 2355, 2368]. NL agreed as its part in these negotiations to pay any royalties which might be charged by DP for any licenses granted to foreign associates of NL in exchange for the right to receive

any royalties which might be charged DP on any United States patents of the foreign associates licensed to DP [Pl. 865-871].

206 84. DP and NL's foreign associates commenced the exchange of patent applications in 1938 [Pl. 487, 879]. Negotiations for a general exchange of patents continued between DP and NL's foreign associates in 1938 in which DP was represented by Rupprecht and Hancock, NL's foreign associates were represented by Kaegebehn, Jebson and Rockwell [Pl. 871-875, 879, 880, 885, 886; Tr. p. 2369]. DP hesitated to make a written general agreement for the exchange of exclusive licenses on present and future patents between itself and NL's foreign associates because of the United States antitrust laws [Pl. 881, 887; Tr. pp. 2368, 2369]. An oral understanding was reached between DP and NL's foreign associates in June 1938 whereby each of said parties agreed to exchange such of its patents and applications as related to the manufacture and use of titanium pigments within the licensed field of Exhibit E with each other as might be desired by each from the other [Pl. 883, 887, 890, 892, 893; Tr. pp. 2343-2347, 2352, 2357, 2358, 2367, 2368, 2372, 2373]. Such of each other's patents and applications as were desired by DP and NL's foreign associates were to be licensed on a royalty free basis in separate annual license agreements [Pl. Q, R, S, 883, 888]. Licenses to granted by DP to NL's foreign associates were to

207 be non-exclusive on their face but were to be exclusive in fact [Pl. 84, 887]. All licenses granted DP by NL's foreign associates were subject to the approval of NL and were exclusive except as to NL [Pl. 884, 887, 889]. All expenses for filing and maintaining DP patents in territories of NL's foreign associates were paid for by the foreign associates in whose territory the patent applications were filed [Pl. 897].

208 85. The oral understanding covering the exchange of patents and patent applications and technical information was based on the understanding and assurances given by DP in 1933 and 1938 that it would not export into the exclusive territories and that said licenses granted by DP to NL's foreign associates would be exclusive in fact [Pl. 887, 883, 884; Tr. pp. 2345-2346, 2356]. Said oral understanding can be terminated only with the termination of Exhibit E-3 [Pl. 881, 887; Tr. p. 2356] and is still in effect subject only to the inability of the parties to exchange patents and patent applications because of

war imposed restrictions. DP observed said understanding and has not in fact exported into the exclusive territories of NL's foreign associates since the understanding of 1933 and has never competed with any of the associates of NL in their respective exclusive territories [Pl. 45, not pr., Pl. 891-944].

209 86. DP acting in accordance with said oral understanding of June 1938 granted royalty-free licenses to Titan Co., Inc., with the right to sublicense NL's foreign associates on June 20, 1938, April 21, 1939, May 10, 1940, and June 23, 1941 [Pl. N, Q, R, S], and continued to make available to NL's foreign associates on a royalty-free basis all patent applications filed by it in the United States relating to the manufacture and use of titanium pigments until a short time before the transmission of such applications was made dependent on the securing of governmental permission [Tr. pp. 2783-84; Pl. 896, 899, 906, 907, 908, 911, 916-934, 936-942, 946-951, 962-970, 971-974]. 35 per cent of DP's TiO_2 sales in 1941 were covered by licenses granted DP in Exhibit S [Pl. 945]. NL's foreign associates acting in accordance with said oral understanding of June 1938 made all of its United States patents and patent applications relating to the manufacture and use of titanium pigments available to DP and via Titan Co., Inc. entered into cross licensing agreements with DP in 1939, 1940 and 1941 [Tr. pp. 2784-85; Pl. Q, R, S, 891, 897, print 3086 at 3090]. No licenses of the patents or applications of NL's foreign associates were granted to any other producer in the United States, except NL and DP [Tr. pp. 2784-85]. All of said license agreements [Pl. Q, R, S] were granted with the consent
210 of NL [Pl. 889]. The exchange of DP patent applications with NL's foreign associates is suspended only during the present emergency and will be resumed upon its termination [Pl. 511, 512, 1216-1218].

211 87. DP deferred the inclusion of certain applications and patents in specific license agreements until it desired such application or patents to be included in certain cross licenses [Pl. 899, 903, 907, 908]. Such patents and applications so deferred were available to DP at all times for use after the understanding of June 1938 even though not licensed. Among such patents and applications so deferred, but available to DP, were the rutile pigment patent applications available to DP from

June 1938 but not licensed to DP until May 10, 1940 [Pl. R, 903, 893, 1229, Pats. 2,303,305; 2,303,306; 2,303,307].

212 88. DP assured NL and its foreign associates in November 1938 that before it filed its patent application relating to the manufacture of rutile pigment it would consult with the representative of NL's foreign associates in order to avoid interference proceedings with the rutile pigment application of NL's foreign associates [Pl. 893, print 3074 at 3079; 894, 895].

213 89. The filing of DP's foreign applications in the territory of NL's foreign associates is under the complete control of NL's foreign associates and all expenses incurred in filing and maintaining said patents are borne by NL's foreign associates who may abandon said patents or applications licensed to them by DP at will upon notifying DP of its intention to so abandon [Pl. Q, print 442 at 454; R, print 457 at 469; S, print 473 at 482; 847, 897, 916-943, 952-958, 967-970, 974, 975-979, 980-982, 983-992]. DP patents issued in the name of DP in the territory of NL's foreign associates can only be licensed if the sublicensees agree not to export from the territory of the foreign associate [Pl. 915].

214 90. No royalties were ever paid by DP to NL or by NL to DP (under the agreement made between NL and its foreign associates in 1937), and neither DP nor NL's foreign associates ever paid any royalties to each other for the use of the patents licensed by them in Exhibits M, N, Q, R, S, [Tr. pp. 3257, 3260].

215 91. The DP-Titan cross licensing agreement of 1940 and 1941 provided for and was intended to restrict the use and export of titanium pigments manufactured under any of said patents by purchasers of said pigments [Pl. 909, 912; R, print 457 at 466, 468; S, print 473 at 479, 480].

216 92. The amendment of Exhibit E on January 1, 1941 [Pl. E-3] did not affect the rights secured to NL's foreign associates under the 1933 agreement and oral understandings, except that mutual plant visits between DP and NL's foreign associates were to cease. Exhibit E-3 did not have any bearing on the important parts

of the agreements and understandings between DP and NL's foreign associates [Pl. 508, 510-512, 12-6-1218].

217. THE EFFECT OF THE COMBINATION AND CONSPIRACY

93. The agreements and understandings entered into between the defendants and the other corporations named in the complaint, have had the following intended effects.

1. The defendant DP has refrained from exporting any titanium pigments or compounds outside the Western Hemisphere in competition with the other titanium pigment producers of the world [Pl. 45, not pr., 1009, 1000]. The defendant NL has refrained from competing with the other titanium pigment producers of the world outside of the Western Hemisphere and has not exported any titanium pigments or compounds outside the Western Hemisphere unless requested so to do by its foreign associates [Pl. 993-1102; Tr. pp. 2592-2600].

2. All of the companies engaged in the manufacture of titanium pigments and compounds outside of the United States have refrained from importing such pigments or compounds into the United States and have refrained from competing with the defendants NL and DP in the United States [Tr. pp. 2618-2621].

3. The defendants NL, DP, and Titan Co., Inc. have imposed restrictions on exports by purchasers of
218 titanium pigments [Pl. 909-912, 993, 1001-1008, 1018-1023, 1073].

4. Prices of titanium pigments and compounds in the United States have been maintained at uniform and non-competitive levels and all competition in the manufacture and sale of titanium pigments and compounds in the United States has been eliminated [Pl. 24, not pr., Pl. 42, not pr., 1208; Tr. pp. 2807, 3097-3105, 3114].

5. The defendants NL and DP have controlled the resale of titanium pigments by purchasers by providing in their respective sales contracts that sales of such pigments are made only for the consumption of the purchaser [Pl. 25, not pr., Pl. 43, not pr.].

6. The defendant DP, has jointly with the defendant NL, restricted the production of titanium pigments by its licensees Zirconium and VC, to prevent said licensees from producing a sufficient amount of titanium pigments to enable them to compete in the United States market with DP or NL [Pl. 1215].

7. The defendants NL and DP control and dominate the

manufacture and sale of titanium pigments and compounds in the United States to the exclusion of all actual or potential competition from any other potential entrant into the titanium pigment business in the United States.

219 8. The defendants NL and DP have secured a monopoly on technical information relating to the manufacture and use of titanium pigments and certain apparatus and equipment necessary to the manufacture of certain titanium pigments to the exclusion and detriment of other producers now engaged in the titanium pigment business in the United States.

9. The defendants NL, DP and Titan Co., Inc. have utilized their patents which relate to the manufacture and use of titanium pigments to control and regulate the manufacture and sale of titanium pigments and compounds in the United States and throughout the rest of the world [Pl. E, E3, H, I, L, M, N, Q, R, S; Pl. 278].

10. The defendants NL and Titan Co., Inc. have controlled the production of titanium pigments and compounds throughout the rest of the world outside of the United States and refrained from competing with their associated companies in markets allocated to said companies after the outbreak of hostilities in Europe in 1939, serving said allocated markets only at the request of their foreign associates and holding any profits therefrom in the markets so served for the associate to which said exclusive territory was allocated.

220 94. The intended effect of the oral understanding between DP and NY's foreign associates in June 1938 has been to make available to DP all of the patents of NL's foreign associates in the United States which relate to the manufacture and use of titanium pigments on the same basis as such patents are licensed to NL and to make available to NL's foreign associates in their respective exclusive territories throughout the world such of DP's patents relating to the manufacture of titanium pigments as are desired by NL's foreign associates on the same basis as NL's patents are made available to its foreign associates. The licenses granted NL's foreign associates by DP on any patents issued in the name of DP in the territories of the foreign associates of NL [Pl. M, N, Q, R, S] were and are exclusive in fact and neither DP nor ICI ever made or attempted to make any use of said patents or applications in the territories of NL's foreign associates.

221 95. The intended effects of the acts of the defendants and the other members of the combination, will continue unless restrained by the court [Pl. 551, 610-614, 1030, 1042, 1044, 1047-1048, 1052, 1056-1057, 1061-1062, 1063-1065, 1076, 1141, 1103-1200, 1218; Tr. pp. 2872-2873, 2875].

Respectfully submitted,

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March 1, 1945.

222 In United States District Court

*Proposed Finding as to Jurisdiction, Defendants, and
Alleged Co-conspirators*

This is an action by the United States to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890), 15 U. S. C. §§1, 2 (1940). The Court has jurisdiction of the subject matter and of the parties. The defendant National Lead Company is a New Jersey corporation. The defendants Titan Company, Inc. and E. I. du Pont de Nemours and Company are Delaware corporations. National Lead and Titanie have offices and are found and transact business in this District. du Pont has its office and principal place of business at Wilmington, Delaware, but is found and transacts business in this District. The business of the defendants and their connection with the activities and violations alleged are described in subsequent findings. The Titanium Pigment Company, Inc. and Krebs Pigment and Color Corporation, both domestic corporations, now dissolved, are named as co-conspirators but are not made defendants. The following foreign corporations are named as co-conspirators but are not made defendants:

Titan Co. A/S

I. G. Farbenindustrie Aktiengesellschaft

Titangesellschaft, m. b. H.

Société Industrielle due Titane

Imperial Chemical Industries, Limited

Goodlass Wall and Lead Industries, Limited
 Imperial Smelting Corporation, Limited
 British Titan Products Company, Limited
 National Titanium Pigments, Limited
 Canadian Industries, Limited
 Canadian Titanium Pigments, Limited
 Kokusan Kogyo Kabushiki Kaisha
 Titan Kogyo Kabushiki Kaisha
 Société de Produits Chimiques des Terres Rares
 Fabriques de Produits Chimiques de Thann et de Mulhouse

223 Societa Anonima Titanum
 Verein für Chemische und Metallurgische Produktion

The nationality of the alleged foreign co-conspirators and the business of all alleged co-conspirators, and their connection with the activities and offenses alleged, are described in subsequent findings.

BETHUEL M. WEBSTER
 CLIFTON P. WILLIAMSON

224 In United States District Court

[Title omitted.]

Proposed Findings of Fact and Conclusions of Law

1. THE ORIGIN AND NATURE OF THE BUSINESS INVOLVED

1. Titanium is an element contained in ilmenite and other minerals. Sands and rock formations containing ilmenite are found in India, the United States, Norway, Brazil, and elsewhere throughout the world.

2. Before World War II the leading American manufacturers of titanium pigments, the defendants National Lead and du Pont, obtained their supplies of ilmenite from India. Since about August 1942, however, their supplies have come mainly from a New York deposit owned, opened up, and operated by National Lead pursuant to and in accordance with a directive of Office of Production Management approved by the Attorney General of the United States.

3. In and before 1920 there was no substantial trade or commerce in, and no commercial manufacture of, titanium pigments for use in paint, paper, rubber, or other products; pigments used for such purposes were lithopone, white lead, and zinc oxide. The use of metallie titanium in alloys was under development by Titanium Alloy

Manufacturing Company at Niagara Falls, N. Y., and chemists engaged in that work (principally Barton
225 and Rossi) were aware of the possibilities of titanium dioxide as a pigment; several important patents on processes and products had been taken out by them; and a subsidiary, Titanium Pigment Company, had been formed by Titanium Alloy to engage in further research, development, and promotion in the pigment field. Before 1920 tests and demonstrations conducted by Titanium Pigment had attracted the attention of large manufacturers of pigments and paints—Pittsburgh Plate Glass (paints), New Jersey Zinc (pigments), the defendant du Pont (pigments and paints), and the defendant National Lead (pigments),—who investigated Titanium Pigment's processes and products; and this led in 1920 to purchase by National Lead of 10% of the stock of Titanium Pigment, with an option to purchase up to 50%. —

4. The feature of titanium dioxide that attracted the interest of chemists and paint manufacturers was its relatively high capacity to impart opacity and color (referred to as hiding power and tinting strength) to compositions treated. It was foreseen by Titanium Pigment and National before 1920 that if titanium pigments of good quality (that is, durable, and satisfactory as to color and texture, &c.) could be manufactured economically, a substantial market could be created, and that to a large extent titanium pigments would be used in place of lithopone, white lead, and zinc oxide. In less than twenty years this vision was realized.

5. The chemists employed by Titanium Pigment at Niagara Falls had made small quantities of relatively pure titanium dioxide (TiO_2) before 1920. They believed, however, that manufacture of the pure product on a commercial scale would be costly in relation to other pigments, and they endeavored to perfect processes for manufacture of "composite" pigments (that is, pigments containing titanium dioxide and relatively large quantities of the sulphates of barium and calcium and other less expensive materials) having hiding power and tinting strength per unit that, though not as high as titanium dioxide, would substantially exceed the hiding and tinting capacity of other pigments then in use. By 1920 process and product patents for titanium pigments developed by them had been granted in the United States, Norway, England, France, and in other countries.

226 6. While the research and experimental work described was going on in the United States, Gustav Jebsen, a Norwegian chemist and business man, was making a similar investigation, albeit along different lines, in Norway—this in connection with his search for means of putting to industrial use large deposits of Norwegian ilmenite-bearing ore. By 1920 Jebsen and his associates had perfected processes patented in Norway, the United States, England, Germany, and in other countries, an important feature of which was disclosure of means for producing relatively pure titanium dioxide pigments by direct application of relatively small quantities of sulphuric acid—a process much less costly than that then developed and in use experimentally at Niagara Falls. Though the Norwegian chemists were aware of the possibilities of composite pigments, they had not perfected processes for the manufacture of such products. In 1920 the process and product patents of Jebsen and his associates were held by Titan Company A/S, a Norwegian company.

7. As early as 1914 Titanium Pigment had some knowledge of the work of Jebsen and his associates, and the latter were aware that processes were being developed in the United States; and in 1914, while he was in the United States on other business, Jebsen conferred with the president of Titanium Alloy and Titanium Pigment, with a view to the sale of Norwegian ilmenite and to exchange of patents and technical information. Owing to World War I, there was no further consideration of such exchange or cooperation until 1920; and during the war development work at Niagara Falls was at a standstill, though research and some experimental work and promotion were carried on.

II. A BRIEF SURVEY OF COMMERCIAL DEVELOPMENT IN THE UNITED STATES (1920-1944)

227 8. In 1920 Titanium Pigment and Titan A/S made an agreement (described in detail below) whereby the American company was exclusively licensed under the Norwegian-owned patents for North America, with the right to grant sublicenses, and the Norwegian company was similarly licensed under the American-owned patents outside North America. On the basis of this agreement, and utilizing the Norwegian as well as its own United States patents, Titanium Pigment (then and thereafter financed and in 1936 fully acquired by National

Lead) undertook a program for the development and promotion of titanium pigments as an economical and otherwise desirable substitute for the pigments then on the market. That this program was commercially well conceived and executed is established by the fact that sales by Titanium Pigment (succeeded by National Lead in 1936) steadily increased from 500 tons (in terms of TiO_2 content) in 1920 to 76,788 tons in 1944, while the price steadily dropped from 40¢ a pound in 1927 for TiO_2 (and correspondingly lower for composite pigments) to 14½¢ in 1944, and by the fact that in 1943 sales of titanium pigments by National Lead alone exceeded sales of lithopone zinc oxide, and white lead by all companies.

9. Increasingly aware of the possibilities of titanium pigments, by 1933 du Pont had obtained rights under the Blumenfeld patents (hereinafter described), which disclosed processes having certain substantial advantages in respect of manufacture of pure titanium dioxide over the Barton-Jebesen patents, but were not sufficient to permit use of the economical direct sulphuric acid attack or for manufacture of composite pigments. After a period of negotiation,—and in view of genuine fear of prolonged, costly, and wasteful patent controversy,—du Pont and National Lead exchanged licenses. du Pont thereupon adopted an aggressive development and promotion program, which was so successful that the company enjoyed a steady growth in sales, and by 1935 it had captured about 50% of total United States sales of all titanium pigments (in terms of TiO_2).

10. Licensed by du Pont and National Lead, American Zirconium Company entered the field in 1935. In 1937 Virginia Chemical Company entered the business with a license from du Pont (but not from National).

11. At no time were there imports of any consequence from abroad. In and after 1922 the tariff applicable to titanium compounds was 30% ad valorem.

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III. THE 1920 AGREEMENT

12. A minority stockholder of Titanium Pigment, with an option to purchase up to 50% of the stock, National Lead was unwilling to make further investments or commitments for development and promotion of titanium pigments unless and until it was satisfied that Titanium Pigment was in a position to use the Jebesen (as well as the Barton-Rossi) processes without risk of litigation; and,

accordingly, at the instance of National Lead, Jebsen came to the United States in 1920 for the purpose of negotiating an agreement under which National Lead would be free to practice the Jebsen inventions and Titan A/S would be free to make use of the inventions of Barton and Rossi. The two sets of processes and patents were regarded by the parties as essential to development and manufacture on a satisfactory commercial scale of a line of titanium pigments comparable in respect to possible uses, and superior in point of quality and economy, to the other pigments then on the market. Accordingly, an agreement negotiated by McCarty, a vice president of National Lead, now dead, and Jebsen was executed July 30, 1920, on behalf of Titanium Pigment and Titan A/S. (As stockholders in Titanium-Pigment, National Lead and Titanium Alloy bound themselves in separate contracts with Titanium-Pigment and Titan A/S to "respect" the principal agreement of July 30, 1920 and to communicate technical information and assign all patents, inventions, and improvements in the "licensed field" to Titanium Pigment.) The features of the 1920 agreement essential to understanding of the case may be summarized as follows:

(a) The field within which licenses were, and technical information was to be, exchanged was defined as including all substances containing above 2% of titanium (unless such substances contained by weight more than 5% of a metal other than titanium in its purely metallic state) and all apparatus, methods, and processes useful in obtaining or manufacturing such substances (except as stated). The intention was to cover processes, substances, and apparatus in the titanium compound field.

229 (b) Titanium Pigment received "a license exclusive of all others including Titan A/S in and for North America (defined as including the continent of that name, Central America, and Panama) under all "existing or future" patents of the Norwegian company, and Titan A/S was granted the same rights outside North America under the patents of Titanium Pigment. The parties agreed not to sell outside their respective territories, except that reciprocal non-exclusive rights of sale were reserved for South America.

(c) Detailed provision was made for exchange of copies of applications for patents filed by the parties or their other licensees, and for the filing and payment of expenses

incidental to the prosecution of such applications and maintenance of patents in territories outside the territory of each; and there was provision for assignment by each company to the other in case either party elected not to prosecute applications or maintain patents outside its territory.

(d) To implement the exchange of exclusive licenses, Titan A/S made Titanium Pigment the exclusive agent of Titan A/S for sales by Titan A/S in North America, such sales to be at prices and on terms determined by the agent, and Titanium Pigment similarly made Titan A/S its sole agent for sales by Titanium Pigment outside North America and South America. (With a view to "the widest possible development of titanium products in the 'Licensed Field'", it was agreed that, notwithstanding the agencies provided for, importations of "finished articles"—that is, paint, paper, rubber, glass, &c.—containing titanium products of the principal, its licensees or sublicensees, would be permitted provided such products did not constitute such an important part of such finished articles that sales within the agent's territory would substantially interfere with the agent's sales of its own titanium products. Written in 1920, before there was any trade or commerce in titanium pigments, much less in articles containing such pigments, this anticipatory restriction on sales of finished articles has always been a dead letter; it has never been applied, and has never had any importance or effect whatever.)

230 (e) It was the purpose of the parties, and especially of McCarty and Jebsen, that the exchange of licenses should promote the maximum development and practice of the art; and to the end (i) that the licenses received by each company would be fully utilized, and (ii) that neither would be inclined or able to withhold information from the other, or make use of inventions or developments of the other for or in connection with further inventions or developments not fully shared with the other, it was agreed that each would impart semi-annually to the other full and accurate information in detail as to knowledge obtained in and applicable to the "licensed field", and would permit the other to inspect and study operations at its plants (exclusive of research laboratories).

(f) In line with the plans and purposes referred to, the parties agreed that the reciprocal grants of exclusive licenses would be for sixteen years (to December 31, 1936),

and thereafter for periods of ten years each, with provision for termination by notice to be given at least five years before the end of any such period; and it was agreed that upon such termination each would receive for itself and its licensees within its territory a non-exclusive license under inventions covered by existing patents or applications of the other, but that in other respects the obligations, liabilities, and benefits would cease. (Notice of termination has never been given.)

(g) In Article XIV of the 1920 agreement (mentioned by number because of its significance in connection with later agreements) it was provided that each company would have the right, so long as it held an exclusive license from the other under the 1920 agreement, to grant licenses under its own patents and sublicenses under the other's patents on condition, nevertheless, that every such licensee or sublicensee would (i) grant to the party to the 1920 agreement other than its licensor its patent rights in the "licensed field" identical in character, territorial scope, and duration to those given by its licensor to the other party to the 1920 agreement, (ii) would appoint such other party its sole agent as specified above in respect of its licensor, and (iii) would impart technical information to such other party in the same manner and to the same extent as its licensor.

231 13. The terms of the 1920 agreement reflect the desire of McCarty, on behalf of National Lead, to establish a sound technical foundation for a new American industry (i.e. secure the right of immediate use of precesses and products patented by Jebesen and his associates, assure that further developments of Titan A/S and its European licensees would be available to National Lead, and avoid patent difficulties and litigation) and the desire of Jebesen, in the interest of Titan A/S, to secure the right to use the American inventions and to obtain the benefits of the vast technical experience, knowledge, and facilities of a large American company which had been engaged successfully for many years in the manufacture of pigments other than titanium pigments, without risking possible commercial competition by that company in areas outside North America in which Jebesen saw opportunities for development by his Norwegian company. The agreement, based on exchange of patents and technical information, thus was intended to establish a relationship analogous to partnership, in which, in the interest of the maximum development of a projected industry, the participants would cooperate.

would refrain from taking advantage of each other, and would guarantee that processes and information coming into the possession of one would be shared with the other.

14. Involving primarily the exchange of patent rights and technical information in an undeveloped industry, the grants of exclusive licenses and the territorial restrictions contained in the 1920 agreement were fairly calculated to, and did, foster research, invention, and technical and commercial development, and resulted, in a relatively short period, in the manufacture and sale in large and steadily increasing amounts, and at steadily decreasing prices, of an important commodity, namely, pigments used by manufacturers of paint, paper, rubber, &c.

15. Between 1920 and 1927 Titan A/S suffered business and financial difficulties which led in 1927 (when I. G. Farbenindustrie, the German Chemical Combine, was negotiating for the purchase of its stock, then controlled by Norwegian banks) to purchase by National Lead of 87% of the stock of Titan A/S (Jebesen retaining 13%). By 1932 National Lead had acquired all of the stock of Titanium Pigment, and in 1936 acquired its assets and assumed its obligations. Since 1929 the rights and obligations of Titan A/S under the 1920 agreement have been held by defendant Titan Company, Inc., called Titaninc, a Delaware company in which National Lead now owns all the stock.

CONCLUSIONS OF LAW

C1. The material provisions of the 1920 agreement are not illegal per se.

[Exclusive restricted licenses: *Bement v. National Harrow Company*, 186 U.S. 70, 94. Cross-licenses, "licensed field", license under future patents, duration of agreement, fixing of terms under which licenses and sub-licenses were to be granted: *Standard Oil Company (Indiana) et al. v. United States*, 33 F. (2d) 617, 626 (N. D. Ill.), rev'd 283 U.S. 163. Exclusive agency: *Schnerb et al. v. Caterpillar Tractor Co.*, 43 F. (2d) 920, 921 (C. C. A. 2d), cert. denied 282 U.S. 898; *Baran v. Goodyear Tire & Rubber Co. et al.*, 256 Fed. 571, 572 (S. D. N. Y.). Exchange of information: *Maple Flooring Manufacturers Assn. et al. v. United States*, 268 U.S. 563. Allocation of territory: *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 595 (C. C. A. 8th), cert. denied 192 U.S. 606; *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation et al.*, 118 F. (2d) 831, 834 (C. C. A. 7th); *Thoms v. Sutherland et al.*, 52 F. (2d) 592, 596 (C. C. A. 3rd).]

C2. A reasonable exercise of patent rights, the material provisions of the 1920 agreement do not violate the Sherman Act.

[Reasonable restrictions: General Talking Pictures Corp. v. Western Electric Co. et al., 304 U. S. 175, aff'd on rehearing 305 U. S. 124, 127, rehearing denied 305 U. S. 675; United States v. General Electric Company et al., 272 U. S. 476, 489-90; Bement v. National Harrow Company, 186 U. S. 70, 91, 92, 93; Vulcan Mfg. Co. v. Maytag Co., 73 F. (2d) 136, 138-9 (C. C. A. 8th), appeal dismissed 294 U. S. 734. Acquisition of information: Appalachian Coals, Inc., et al. v. United States, 288 U. S. 344, 374. Exchange of technical information: Bee Mach. Co., Inc. v. Freeman, 131 F. (2d) 190 (C. C. A. 1st), aff'd 319 U. S. 448, 233 rehearing denied 320 U. S. 809, and Bee Machine Co. v. Freeman et al., 40 F. Supp. 299 (S. D. Ohio), aff'd 121 F. (2d) 451 (C. C. A. 6th); L. L. Brown Paper Co. v. Hydroiloid Inc., et al., 32 F. Supp. 857, 860 (S. D. N. Y.), aff'd 118 F. (2d) 674 (C. C. A. 2d), cert. denied 314 U. S. 653. Unlicensed importation constitutes infringement: Boesch v. Gräff, 133 U. S. 697. Territorial restrictions: Becton, Dickinson & Co. v. Eisele & Co., 86 F. (2d) 267 (C. C. A. 6th), cert. denied 300 U. S. 667; Skee Ball Co. v. Coher., 286 Fed. 275, 276 (E. D. N. Y.); Elliott Co. v. Lagonda Mfg. Co., 205 Fed. 152, 157-8 (W. D. Pa.), modified and aff'd 214 Fed. 578 (C. C. A. 3rd), cert. denied 235 U. S. 697; St. Louis Street Flushing Mach. Co. et al. v. Sanitary Street Flushing Mach. Co., 178 Fed. 923, 926-7 (C. C. A. 8th), cert. denied 219 U. S. 588; Edison Electric Light Co. et al. v. Goelet et al., 65 Fed. 613, 615 (S. D. N. Y.); see United States v. Standard Oil Co. (Indiana) et al., 33 F. (2d) 617, 629-30 (N. D. Ill.). Exclusive sales agents: Virtue v. Creamery Package & Co., 227 U. S. 8, 32. The purpose and effect of the agreement were "To promote the Progress of Science and useful Arts" and to stimulate commercial development of the inventions licensed: Const. Art. I, Sec. 8; see Motion Picture Patents Company v. Universal Film & Co., 243 U. S. 502, 511; Ethyl Gasoline Corporation et al. v. United States, 309 U. S. 436, 439; Whitwell v. Continental Tobacco Co. et al., 125 Fed. 454, 458 (C. C. A. 8th).]

C3. The restriction on the sale of finished articles did constitute a potential limitation not warranted by the Sherman Act as now understood; but the restriction, which was entirely anticipatory when drawn, has never been and never will be enforced, and is therefore moot and not subject to exercise of equity jurisdiction.

[United States v. Kryptok Co. et al., 11 F. (2d) 874 (S. D. N. Y.).]

C4. National Lead having succeeded to Titanium Pigment's rights and obligations, and having acquired 87% of Titan A/S,—and Titanine (owned by National Lead) having succeeded to the rights and obligations of Titan A/S under the 1920 agreement,—the agreement is a nullity except as hereafter stated.

234 IV. THE FRENCH AGREEMENT (1922-1927)

16. Between 1920 and 1927 commercial development was slow, even in the United States, where the resistance of manufacturers, painters, and other consumers to the new pigments was less marked than it was abroad. (In 1921 Titanium Pigment sold 500 tons, in terms of TiO_2 content; in 1927 it sold only about 2000 tons. In the latter year it was still selling at a loss, though prices were relatively high. This was possible only because National Lead was financing the development by advances and purchases of stock.) During the same period Jebesen faced serious difficulties in Europe. Using the Barton-Rossi processes, he introduced composite pigments, which were much less expensive than the titanium dioxide previously manufactured. But he endeavored with little success to establish markets in Norway and Sweden, England, France, Holland, and Belgium; and by 1927, when National Lead purchased 87% of Titan A/S, the capital of the Norwegian company was greatly reduced and it was heavily in debt to the banks.

17. In France, where there was a tariff on titanium, Jebesen endeavored to work with local interests. He negotiated with one group and then another with a view to manufacture in France under licenses similar to those held by Titanium Pigment and Titan A/S. It transpired that the first group was incapable of developing and promoting the new product; the second gave up because they thought it would take too long to establish a market. Finally, Titan A/S and National Lead purchased the second group's interest in Societe Industrielle, a French company, which had been and thereafter was used as the selling agency for pigments shipped from Norway or Germany. (Titan A/S owned about 20% of the French company; National Lead acquired an additional 58%, which in 1929 was transferred to Titanine; the remainder was held in France by members of the public.).

18. In a letter written to Societe Industrielle in March 1927 Jebson confirmed on behalf of Titan A/S a "Protocol" of May 1925 under which there was an exchange of licenses consistent in material detail with the exchange by the 1920 agreement described above. Subject to mutual obligations and restrictions like those assumed and imposed by the 1920 agreement, the French company received rights at the disposal of the Norwegian company for France, its colonies and possessions. It was stipulated that the exclusive licenses would remain in force until December 31, 1941, and thereafter for ten year periods, subject to termination by notice given at least six years before December 31, 1941, or before the expiration of any subsequent ten year period. Notice of termination has not been given. In 1929 the rights of Titan A/S in the French agreement were transferred to Titanine.

19. The hope that the French company would use its license from the Norwegian company to manufacture in France, and thus contribute to the fund of processes and technical information available to Titan A/S and Titanium Pigment, was not realized; Societe Industrielle served merely as a local selling agency for pigments produced elsewhere. Nothing more than an allocation by Titan A/S of part of its sales territory, the French agreement added nothing of substance to arrangements made in the 1920 agreement.

20. For all practical purposes the agreement and all business relations with the French company were terminated when Paris and the industrial area of France were occupied by the Nazis. The answer to the question whether business with the French company can be resumed,—and, if so, on what basis,—depends on the capacity of France to resume industrial and commercial operations after the war.

CONCLUSIONS OF LAW

C5. A means by which Titan A/S could enlarge its market for a new product, with a prospect of securing additional inventions and technical information (available also to Titanium Pigment), the French agreement did not restrain—it promoted—commerce in titanium pigments.

236 C6. Made in the interest of establishing a market in France, its colonies and possessions, for a new competitive product, the French agreement was not in-

tended to have an effect on prices in the United States or otherwise to deprive purchasers or consumers in the United States of the advantages of competition.

[Apex Hosiery Co. v. Leader et al., 310 U. S. 469, 500-2.]

C7. An arrangement with reference to Norwegian and French commerce, the French agreement did not directly and materially affect United States commerce and is not subject to regulation under the Sherman Act.

[United States v. Aluminum Co. of America et al., 44 F. Supp. 97, 246, 249, 283 (S. D. N. Y.).]

C8. In so far as the French agreement involved the extension or application of essential features of the 1920 agreement to areas within the territory of Titan A/S, it constituted a reasonable exercise of patent rights.

C9. The Court will not cancel or require cancellation of the French agreement for the following reasons:

(i) The agreement involves a French company not before the Court whose material interests would be adversely affected and whose future will be determined by decisions of the Allied Governments.

[Shields et al., v. Barrow, 17 How. 129; Consolidated Edison Co. et al. v. National Labor Relations Board et al., 305 U. S. 197, 232-3.]

(ii) The agreement related wholly to business in foreign countries.

[United States v. American Tobacco Company, 221 U. S. 106, 191 Fed. 371, 418 (S. D. N. Y.).]

237 (iii) The executory features of the agreement were terminated by act of war when parts of France were occupied.

[The William Bagaley, 5 Wall. 377, 407.]

(iv) As far as National Lead and Titanine may be involved, the agreement was terminated by act of war when United States forces invaded French territory in North Africa.

[United States v. Hamburg-Amerikanische &c., 239 U. S. 466; United States v. American-Asiatic Steamship Company et al., 242 U. S. 537.]

V. THE GERMAN AGREEMENTS (1925-1927)

21. After 1925 I.G. Farbenindustrie was the largest company in Germany,—one of the largest chemical companies in the world,—with vast interests and important connections throughout the world, and especially in Central Europe. Its manufacturing resources and facilities and its research and sales organizations were unsurpassed

anywhere. From Jebesen's point of view I.G. was, obviously, either a potentially invincible competitor or the most powerful ally in Europe. That is why he feared it when it sought to buy his small Norwegian company from the banks, why he was interested when it approached him with a view to a license. Jebesen knew that to succeed in his own enterprise he would have to come to terms with I.G.: Titan A/S was in distress and about to close down; German manufacturing conditions and costs were so favorable (e.g. sulphuric acid cost in Germany was one-half the cost in Norway or England) that Jebesen looked upon a connection with I.G. as affording a congeries of advantages, including ~~was~~ research and development and sales facilities, capacity for cheap manufacture for all or most of Europe, a profitable market for large quantities of Norwegian ilmenite. So confident were the Germans of their manufacturing capacity and costs, that they offered in consideration of a license to buy Norwegian ilmenite at cost plus 30-50% and to supply Titan A/S with titanium pigments at cost. (In 1924 or 1925

Jebesen had investigated another German company
238 which had manufactured titanium pigments on a very small scale and which held certain patents, but had concluded that the company's prospects were not of sufficient interest to warrant an association. There was no other manufacturer in Germany, and there was no demand by paint manufacturers and other consumers, who were accustomed to other pigments including lithopone manufactured by I.G.)

22. Having saved his Norwegian company from purchase by the Germans, and having at the same time secured the backing of National Lead (which in 1927 had acquired 87% of Titan A/S), and believing that it would be impossible for him to undertake manufacture in Germany and sale in Germany and German-dominated territory without the cooperation of I.G., Jebesen proceeded to negotiate a series of agreements, as follows:

(a) For the purpose of cooperating in the manufacture and sale of titanium and titanium compounds in Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Rumania, Serbia-Croatia-Slovenia, Bulgaria, Greece, Turkey, Japan, China, and Spain, Titan A/S and I.G. undertook to organize a German company, *Titangesellschaft*, to which each would contribute one-half the initial capital. The parties were to have an equal voice in the selection of the "managers", but responsibility for policy and

overall supervision was placed in the hands of Jebsen and a representative of I.G. It was stipulated by both parties that titanium compounds for sale in the countries referred to would be manufactured by Titangesellschaft, and that both would cover their total requirements in those areas from Titangesellschaft. It was agreed that Titangesellschaft could not be dissolved before the end of 1957, and then only on six months notice; thereafter it could be dissolved on such notice at the end of any successive ten year period.

(h) Further to secure the cooperation of I.G., it was agreed that I.G. would grant Titangesellschaft an exclusive license, with the right to grant sublicenses, under all patents, methods, and experience of I.G. in the "licensed field" and would supply Titangesellschaft with copies of applications for German patents and, at the request and expense of Titangesellschaft, would prosecute similar applications in countries designated by Titan-
239 gesellschaft; and it was agreed by Titan A/S and Titangesellschaft that they would exchange licenses and technical information, and conduct their operations in and with reference to Germany and the other countries referred to, in accordance with the principles of the 1920 agreement between Titanium Pigment and Titan A/S. (It was stipulated that Titan A/S might "substitute for itself" in these agreements another company or other companies in which Titan A/S and National Lead, or either of them, were "engaged" 100%; and, subject to immaterial exception, Titan subsequently did take over the rights and obligations of Titan A/S.)

(c) In a series of ancillary agreements I.G. undertook
ap (i) to provide a factory site and building near its Leverkusen works (rent at 6% of the value of the building); (ii) to furnish steam, gas, water, and electricity (at cost), (iii) to supply transportation facilities (at reasonable prices), and (iv) to deliver raw material (at cost plus 10%, but not more than the competition charged, with provision for "most-favored" customer treatment). I.G. was appointed agent of Titangesellschaft for sales in the countries mentioned.

(d) Worthy of special reference as bearing on Jebsen's plan to advance as rapidly as possible the production and sale of high quality, economical titanium pigments,—that is, really to compete on the most favorable possible basis with other pigments,—and at the same time to build up a large and consistent market for Norwegian ilmenite, is (i)

the agreement of Titangesellschaft to satisfy its ore requirements by purchases from Titan A/S at cost plus 30-50% (stated in terms of Norwegian Gold Kroner, and favorable to Titan A/S because of exchange factors), and (ii) in view of Jebesen's high costs and his intention to close down his Fredrikstad plant, the agreement of Titangesellschaft giving Titan A/S the right to take 50% of the pigments produced at Leverkusen at cost (and quantities in excess of 50% at cost plus 10%).

23. Titangesellschaft was organized and did operate in accordance with the agreements described. It purchased large quantities of ore from Titan A/S at a satisfactory price. The conviction that it would be a fertile

240 source of inventions and technical information useful in the United States and England particularly, as well as in Germany, was confirmed. Thanks to I.G.'s 50% interest in the company, Titangesellschaft was able to make use of I.G.'s superb sales organization to push the sale of titanium pigments at the expense of other pigments (including lithopone made and sold by I.G.) in the market not accessible to National Lead or Titan A/S. Its costs and prices were low, its quality high. The far-sighted arrangement under which Titan A/S (Titanine after 1929) was able to obtain pigments at cost proved to be of great value as soon as manufacture at Leverkusen was commenced, and especially in respect to sales in the British market, where Jebesen had been able to make limited headway with his high priced pigments, and where there was no manufacture until about 1934.

24. The nature of German industrial organization between 1920 and 1940,—under the Weimar Republic as well as under the Nazis after 1933,—was such that the means devised and applied by Jebesen to engage in business and promote titanium pigments in Germany and German dominated countries were well conceived and well executed, and so far as National Lead and Titanine were concerned were the only practical means by which they could engage in the commerce involved.

25. All relations between National Lead or Titanine and I.G. or Titangesellschaft were terminated by the declaration of war in December 1941. National Lead has written off its investment in Titangesellschaft; it will not resume or enter into agreements containing territorial restrictions; and its plans and ability to carry on business relations with the German companies after the war depend

entirely upon provision to be made for German industry and trade by the Allied Governments.

26. In 1933 I.G. was informed by Sachtleben, a German lithopone company affiliated with Metallgesellschaft, the powerful German metal company, that Sachtleben intended to undertake the manufacture and sale of titanium pigments; and I.G. thereupon agreed to assign to Sachtleben a part of I.G.'s quota under the European Lithopone Convention (Cartel) in consideration of Sachtleben's agreement to stay out of the titanium business. After this arrangement had been made Jebesen was informed; 241 and I.G. demanded that it be reimbursed by Titan-gesellschaft for the loss of the lithopone business assigned to Sachtleben. Jebesen and National Lead did not approve of the arrangement or of the proposal for reimbursement, but acquiesced reluctantly and as a matter of expediency to accommodate the important representative of I.G. who had made the commitment to Sachtleben.

27. The German agreements and arrangements described above were shaped by political, economic, and legal considerations which may be stated as follows:

(a) The liberal governments of Germany during the post-World I era recognized the national problem that lay hidden in the cartel system. The first Kartellverordnung was issued in 1923. It gave cartels a well-defined legal status and placed them under government supervision.

(b) In all major German industries agreements existed, regulating competitive practices, allocating outputs and markets.

(c) After 1923 there were two factors that acted powerfully in the direction of increasing the economic concentration of German industry. One was the need for new capital for industrial reconstruction and modernization. The other was the disruption of the structure of both production and marketing that resulted from the First World War. With respect to the former, the shattered condition in which German industry emerged from the First World War was the major factor. Machinery was worn out, repairs had been neglected, and the financial position of most enterprises was unsound, owing to the rapid progress of inflation. Inflation itself and the ability to finance plant expansion with paper money promoted the process of physical reconstruction up to a point. It stimulated, however, an unplanned, widely competitive over-building of industrial plant, regardless of its post-inflation costs.

of operation and future uses, merely as a matter of flight from the depreciating currency. Moreover, when stabilization came, the working capital position of the whole German economy was found to be woefully inadequate.

242 Both cash and inventories, especially inventories of imported raw materials, had been squandered during the war and inflation. Large new liquid capital resources had to be found. Especially in view of the heavy reparations burdens imposed on the German economy it was essential to attract new foreign capital investment. Such foreign capital was, however, only obtainable on well-founded prospects of profits and would not have been available to industries in which conditions of cut-throat competition prevailed. In the absence of legal obstacles to mergers and cartel agreements, these financial requirements were alone sufficient to give powerful impetus for a tight organization of German industry. Added to this there was a second, and, in the long run, probably even more important incentive—the disruption of production and marketing processes due to the loss of the First World War.

(d) International cartelization was thought to be the only effective solution of the problems so created. French economic interests were among the most powerful promoters of international cartelization in the interests of post-war international economic collaboration and a return to stable conditions required for a durable peace. They were largely responsible for convocation of the World Economic Conference held by the League of Nations in 1927. One of the objectives of this Conference was to attempt to create order out of chaos, to attempt systematic economic reconstruction by the coordination of European industries and the rational organization of their mutual trade. Even before the World Economic Conference French and German steel makers were able to conclude agreements. A large number of cartels sprang up also among the industries of the successor states, as well as between the successor state industries and German industries.

(e) In July 1930 the government issued a second executive order to regulate cartels, which revised and strengthened the ordinance of 1923 in the light of subsequent experience.

(f) The network of national and international cartels that was created during the 1920s was subjected to violent strain after Germany's foreign exchange difficulties in

1931. Since, however, the central position of the German economy on the Continent of Europe remained unaffected, all that was necessary, and indeed possible, was to readjust the cartel agreements to the changed conditions. These readjustments, however, did not occur under the old Kartellverordnung any more. The depression washed away the foundations of the liberal capitalistic reconstruction of Europe that was attempted during the twenties.

(g) Much of the voluminous American literature on German industrial organization under the Nazis tends to project backwards the phenomena of Nazification. This obscures the revolutionary character of the Nazi movement and the revolutionary nature of the changes it has caused in German economic organization.

(h) The advent of the Nazis to power created a radically new situation. They first resorted to deficit spending, on a scale never previously attempted in peacetime, for the purpose of reemployment. Presently they converted their reemployment expenditures into rearmament expenditures, and proceeded to integrate the whole German economy in the service of this rearmament effort. On July 15, 1933, they issued a new cartel decree establishing the right of the Reich to compel cartelization wherever the authorities considered it desirable. By their law for the reorganization of the German economy, issued in February 1934, they gave themselves authority for the most far-reaching economic reorganization, which authority they then proceeded to use to the full.

(i) In November, 1934, a new cartel order reorganizing the whole German economy was issued. It compulsorily cartelized the whole of German industry, both horizontally and vertically. An industrial supercartel was created, called the Reichsgruppe Industrie, and a whole system of public cartels was fitted into it; previously existing private cartels had to fit into this system as best they could. Moreover, the approach of the Nazis towards industry was radically different from that of the liberal Republic which merely concerned itself with the question of how to police cartels. The German Government from 1934 on used German industry and German cartels as instruments of national policy, frequently against the wishes of the industries and industrialists involved, and thus created patterns of economic control that had previously been considered permissible or possible only in wartime.

244 (j) In the international sphere this use of German industry for the promotion of what the Nazi

Government considered to be Germany's national interest was further complicated by foreign exchange policies also aimed at the promotion of these genuine or supposed national interests of Germany. International trade by German industry was subjected to regulation not only from the viewpoint of overall national policy, but also from the specific angle of providing the national government with foreign exchange resources of the quantity and composition that they thought they required. As often as not, international cartel agreements of German industry had to be revised to meet this purpose, regardless whether the German companies affected and their managements considered these modifications to be in their or their associates' interests.

(k) Since about 1937 German industry has been wholly under the control of military requirements. What the post-war position of German industry will be, nobody can say; but it is self-evident that a freely competitive industrial structure cannot exist in Germany for decades to come, if ever.

(l) Subsequent to the hectic years immediately following the First World War foreign nations were able to import vast quantities of materials for reconstruction and development purposes, largely financed by loans from the United States. The resultant business activity provided a powerful stimulus to world recovery during the years 1924-29. Subsequent to 1929, there occurred a drastic reduction in the total supply of dollars available to foreigners. The reduction resulted from the cessation of foreign lending and the drop in imports into the United States that was caused partly by the beginning of the depression, partly by the Hawley-Smoot Tariff. Since dollars and sterling were the principal media for the financing of international trade, and sterling itself was endangered by the shortage of dollars that developed, the effects of this dollar shortage on international trade was catastrophic. In the United States the quantity of imports continued to be closely related to industrial production. Their value declined faster than national income only because of the greater price decline of internationally trades commodities. The quantity of imports into 245 foreign countries dropped disproportionately as compared to their industrial production; and their imports from the United States dropped much faster than their total imports. In other words, under the impact of the world-wide dollar shortage there was a drastic reduc-

tion in the ratio of world trade to world production, and a further reduction in the proportionate share of the United States in total international trade. The methods by which the use of dollars was restricted in foreign countries were numerous and sophisticated. Their primary objective in each case was to reduce total imports from the United States and to substitute for them either domestic production or at least imports from other sources. Helping to reduce both the dollar shortage and domestic unemployment in one fell swoop was usually the official policy.

(m) The collapse of the German banking system in the spring of 1931 was primarily the consequence of excessive short-term borrowing in London and New York, and to the freezing of the funds so borrowed in loans that became uncollectible after the onset of the world depression.

(n) On July 15, 1931, after all the banks had been closed, a presidential emergency decree was issued regulating commerce in foreign exchange. The basic principle of the allocation of import exchange was that every enterprise in Germany was entitled to spend on imports an amount of foreign exchange equal to its average monthly foreign exchange expenditures on imports during the period July 1, 1930, through June 30, 1931. This allocation of import exchange was already far below pre-depression levels, but still very liberal as compared to subsequent restrictions. The shortage of exchange of the German authorities became so serious after the depreciation of the pound sterling in September 1931 that in May 1932 this allocation of import exchange had to be reduced to 50% of the base period maximum.

(o) The depreciation of the dollar in 1933 caused major additional difficulties to the German export trades and thus reduced further the supply of foreign exchange. Moreover, the Nazi government was intent to build up the war potential of the German economy; the supply of foreign exchange began increasingly to be diverted to the requirements of defense. As a result, beginning in February, 1934, drastic measures became necessary for the further curtailment of ordinary commercial imports. The import exchange quotas to which enterprises were entitled without special license were in very short order reduced from the previous 50% to 5% of the base period level; many imports were altogether prohibited except under license, and foreign trade became partly a tool, partly a weapon, of economic warfare.

(p) On the Continent of Europe and in the non-British world generally the dollar shortage remained acute throughout the nineteen thirties. In the ultimate analysis this dollar shortage was responsible for the abandonment of the gold standard by the three "rich" countries, Holland, Switzerland, and France in 1936, as well as for the maintenance, and (after 1937) renewed intensification of exchange restrictions, in all the "poor" countries. It was this dollar shortage that kept the share of the United States in total world trade lower than it had been in the previous decade. After a temporary alleviation of the dollar shortage in 1936-37 the slump at the end of 1937 once more intensified the world-wide dollar shortage, when solely due to a drop in our imports we rapidly changed from a small import surplus to a billion dollar a year export surplus.

(q) During the thirties the armaments race became an increasingly important factor in confining more and more to products of military necessity the imports to the Continent of Europe from the United States. The renewed dollar shortage in 1938 further increased the need to restrict the utilization of dollars to the purchase of military necessities.

(r) The import licensing systems and foreign exchange control systems that were in effect in most continental countries over most of the period strongly militated against American exports of products that were directly competitive with domestic products in those countries. Full employment policies as well as foreign exchange considerations both led to import restrictions. Even less good or more expensive domestic products were preferable as long as they did not require dollar exchange, 247 and as long as their domestic production provided additional employment.

(s) The Continental European countries were thoroughly cartelized. Exchange controls suited these cartels and entrenched their control over domestic and neighboring markets. The cumulative effect of reemployment and rearmament made the Continental European markets virtually impregnable to American products aimed for general consumption.

(t) In view of the factors described, any United States company starting an aggressive policy of exporting to the Continental markets would have faced major obstacles at this time if its products were not militarily useful. The total volume of exports that could have been sold would

have been negligible before restrictions would have been clamped down by these countries, based on considerations of foreign exchange and employment, strongly supported by domestic cartels. Thus there was little incentive for American companies to engage in an export trade whose total proceeds would have been trifling and whose net effect would have been the establishment of lasting bad relations with well-entrenched European interests.

CONCLUSIONS OF LAW

C10. A reasonable, if not the only, means by which Titan A/S could secure (i) a large and consistent market for its Norwegian ilmenite, (ii) participation on a practical, profitable basis in the manufacture and sale of titanium pigments in Germany and Central Europe, and (iii) the right to use I.G.'s inventions and to share fully in the benefits of I.G.'s vast technical and marketing facilities, experience, and knowledge, the German agreements did not restrain—they promoted—commerce in titanium pigments.

C11. Made for the purpose of establishing a business where none existed before,—of securing great technical and commercial advantages not otherwise available,—the German agreements were not intended to, and did not affect prices in the United States or otherwise deprive purchasers in the United States of the advantages of competition.

C12. An arrangement respecting Norwegian and German commerce, the German agreements did not directly and materially affect United States commerce, and they are not subject to regulation under the Sherman Act.

C13. In so far as the German agreements involved the extension or application, by or on behalf of National Lead or Titanine, of features of the 1920 agreement to areas within the territory of Titan A/S, they constituted a reasonable exercise of patent rights.

C14. The Court will not cancel or require cancellation of the German agreements for the following reasons:

(i) They involve German companies not before the Court whose material interests would be adversely affected and whose future will be determined by decisions of the Allied Governments.

(ii) The agreements related wholly to business in foreign countries.

(iii) The agreements were terminated by declaration of war in December 1941, if not before.

(iv) There is no such threat that the agreements or the restrictive features thereof will be resumed or reinstated as would warrant an injunction.

[United States v. Hamburg-Amerikanische &c., 239 U. S. 466, 475-6.]

VI. THE BRITISH AGREEMENTS (1933)

28. I.G. Farbenindustrie A.G. was organized in 1925 as a merger of the largest chemical and dye producers of Germany. These producers had operated under a "Community of Interest Agreement" (Interessengemeinschaft) since 1916 and under various cartel agreements since about 1900. After 1928 the merged enterprise had 249 capital in excess of \$250,000,000 (\$420,000,000 after devaluation of the dollar). By virtue of excellence of management and resources, I.G. was the leading chemical enterprise of the world. The weakness of the British (and Americans) in chemicals and dyestuffs had been demonstrated in World War I. Aware of this weakness and alert to what was going on in Germany, the British decided to act. In 1926 they organized Imperial Chemical Industries, Limited, as an amalgamation, sponsored by the British Government, of the leading British chemical companies. With assets exceeding £100,000,000, I.C.I. was the largest manufacturer of chemicals in the British Empire; it was intended to, and did, rival I.G. in respect of research, manufacture, and trade. I.C.I. was the agency by which the British chemical industry sought to, and did, secure self-sufficiency and dominance throughout the Empire.

29. Jebsen had attempted for years to establish a British market for his pigments, but with limited success. The traditional conservatism of the British manifested itself in the habits and attitude of paint manufacturers and master painters who were accustomed to pigments of domestic origin. "Buy British" was more than a slogan—it was a stubborn and formidable fact. Knowing from costly experience that he could not hope successfully to invade, much less to capture, the British market without a strong local alliance, Jebsen set out to obtain one. Though I.C.I. had never manufactured pigments, it was, obviously, the most desirable British partner; for it had resources in the way of technical and commercial facilities, raw materials, &c., not possessed by any other firm. Imperial Smelting Corporation, Limited, and Goodlass Wall and Lead Industries, Limited, were also natural allies.

I.S.C. was the largest British manufacturer of zinc and lithopone; it could supply sulphuric acid; it had important connections throughout the Empire; and it had strong management, friendly to National Lead. Goodlass Wall, a government sponsored amalgamation of lead companies, was brought in for similar reasons.

30. In February and March 1933 Titanine, I.C.I., I.S.C., and Goodlass Wall entered into a series of agreements, as follows:

250 (a) Based on factual premises as to patents and processes of Titanine and a record of successful commercial manufacture in Germany and the United States, and as to the 1920 agreement and the German agreements, the right of manufacture and sale of titanium compounds throughout the British Empire (excluding Canada, Newfoundland, and certain other areas) was vested in a new company, British Titan Products, Limited; and I.C.I., I.S.C., and Goodlass Wall agreed that they would not deal in or manufacture such compounds except through or at the request of British Titan. Subject to restrictions on transfer, the voting shares of British Titan were distributed among Titanine—49% (with the right to allot 5% to R. W. Greif & Co., Ltd., which had been the British sales agent of Titan A/S and, later, Titanine), I.C.I.—17%, I.S.C.—17%, and Goodlass Wall—17%. Titanine received the right to name three of the six directors, but it was stipulated that the chairman must be one of the directors, named by the British shareholders. The agreement was for thirty years, with severely limited provisions for retirement.

(b) It was agreed by Titanine and British Titan that they would exchange licenses, patent applications, and technical information, and conduct their operations in and with reference to the British Empire (excluding Canada, Newfoundland, and certain other areas), in accordance with the principles of the 1920 agreement above described.

(c) In order to vest in British Titan and Titanine (and its licensees) all the benefits of their research and development, I.C.I., I.S.C., and Goodlass Wall each gave British Titan an exclusive license in respect of I.C.I.'s, I.S.C.'s, and Goodlass Wall's patents, processes, and subject matter within the "licensed field" (limited in the case of I.C.I. to titanium oxide or titanium pigments) for the production of titanium compounds, with the right to manufacture, use, or sell compounds so produced, and with the right to grant sublicenses; and each such grantor agreed

that it would supply British Titan with copies of its applications for patents in the "licensed field" and, at the request and expense of British Titan, would prosecute similar applications in countries designated by British Titan.

251 (d) The 125,000 non-voting shares of £1 each of British Titan were allotted to Titanine in consideration of its existing business and good will in the British Empire and its agreement to make available to British Titan all technical knowledge and experience at its disposal in the manufacture of titanium products or relating to the marketing thereof in the British Empire.

(e) The right of Titan A/S to buy 50% of the German production at cost (and more at cost plus 10%) having been transferred to Titanine, the latter agreed until such time as British Titan commenced to manufacture, and for two years thereafter, to supply British Titan's requirements at cost.

31. Located near the I.C.I. factory at Billingham, and in charge of a former I.C.I. employee, the British Titan factory commenced operations in 1934, and has operated successfully ever since. Plans have been made for substantial increase of production after the war. The choice of partners was most fortunate. Apart from inventions and technical facilities and information of great value, I.C.I., I.S.C., and Goodlass Wall have supplied management and sales experience and advice of a high order.

32. In February, March, and April 1943 there were conversations between representatives of National Lead and members of the Antitrust Division, Department of Justice, relating to a proposed consent decree. The conversations were suggested by the Division's pending investigation of the titanium pigments industry and antedated the indictment against the defendants herein and Messrs. Rockwell, Garesche, and Jebson of National Lead, and another, returned in this District June 28, 1943. It was impossible to find a basis of agreement and the conversations were terminated. Thereafter the indictment (No. 114-455) was returned. Following the consent decree discussions with the Antitrust Division in the spring of 1943, there were conferences between the attorneys for National Lead and the president of the company (Rockwell) at which the Division's objections to certain contracts were discussed and consideration was given to the position of the company in respect of performance of and compliance with the

252 contracts pending trial. Owing to the war production of the company, it was thought that no case

would be tried during the war. It was the position of the president that in view of the probable delay it would not be prudent, and he did not desire, so far as it was practicable to avoid it, to permit the company to continue to operate in accordance with provisions which had been criticized by the Government; and the attorneys for National Lead were instructed to protect the company against the possible charge that it had persisted in a course of action after the Government's objections had been made known and, if possible, to take steps to revise the contracts in such a way as to meet the objections and at the same time avoid unnecessary sacrifice of the company's investments and other interests. The basis of the Antitrust Division's criticism of National Lead, both in the indictment and in the complaint in this action (filed June 24, 1944), is the 1920 agreement between Titanium Pigment and Titan A/S. The agreement, containing certain restrictions objected to by the Antitrust Division, might have been terminated or relinquished in some way but for the fact that its terms had been carried over in part into contracts between National Lead and I.C.I., I.S.C., Goodlass Wall, and British Titan—and also into Canadian agreements described below,—and that in such agreements certain provisions had been conditioned on the 1920 agreement. Because of the foregoing, the attorneys for National Lead concluded that they could best serve their client by formulating, and endeavoring to have the parties approve, further agreements between National Lead and the British and Canadian companies which would remove features of the agreements criticized by the Antitrust Division and, in particular, provisions based upon the existence and terms of the 1920 agreement. Substantial progress in this direction has been made; and at a pre-trial conference in this case held October 30, 1944 counsel for National Lead tendered a form of contract agreed to, but not executed, by National Lead and the British companies. A copy of the proposed agreement was received in evidence at the trial. The parties are I.C.I., I.S.C., Goodlass Wall, Titanine, British Titan, and National Lead, and the agreement provides in substance as follows:

- 253 (a) Licenses exchanged by British Titan and National Lead (Titanine) will be non-exclusive, and royalty free, with the right to grant non-exclusive sublicenses but only to parties who will license British Titan or National Lead, as the case may be, on a non-exclusive, royalty free basis under the patents and applications of such sublicensees.

(b) The licenses will be without restriction as to production, shipment, sale, or use of titanium compounds; and it is provided that neither the 1933 British agreements nor the 1920 agreement will preclude British Titan or National Lead (or Titanine) from manufacturing, selling, or using in, or from shipping from or to, any place in the world, titanium compounds or any product, finished or unfinished, or from otherwise fully exercising the grants made by them.

(c) It is agreed that the holdings of voting shares in British Titan will be rearranged so as to insure that National Lead (or Titanine), I.C.I., I.S.C., and Goodlass Wall will each hold the same number of shares.

(d) The right of National Lead to name three directors of British Titan is cancelled, and National Lead has agreed to refrain from taking any part in or exercising any influence in respect of deliberations or decisions of British Titan concerning any business of British Titan within, from, or to the United States.

(e) All restrictions on the disposition by National Lead of its shares of British Titan contained in the 1933 agreements are cancelled, and it is agreed that the Articles of Association will be amended to remove therefrom all such restrictions.

(f) The proposed agreement supersedes, in so far as inconsistent therewith, the 1933 agreements, and to the extent that any provision or provisions of the 1933 agreements are inconsistent therewith they are deemed to be amended.

(g) The license agreement between Titanine and British Titan made in March 1933 is cancelled.

(h) The agreement for exchange of licenses under patent rights hereafter acquired may be terminated

254 by British Titan and National at the end of any year by three years previous notice in writing, or by National by notice given at any time pursuant to order of this Court, or by British Titan by notice given at any time pursuant to order of competent authority in Great Britain pursuant to the Defense Regulations 1941 or pursuant to the order of any competent court in Great Britain. The proposed agreement was negotiated and submitted in good faith as a means of meeting objections made by the Antitrust Division, and at the same time of avoiding litigation in England on claims that might be asserted against National Lead or Titanine by the British companies, and of conserving National Lead's investment in British Titan.

33. British Titan was not the only manufacturer of titanium pigments in the British Empire. A small company, National Titanium Pigments, Limited, known as Laporte, having acquired rights under the so-called Tilden-Smith patents and under the Blumenfeld patents for the British Empire entered into agreements with British Titan fixing prices in the British market excluding Canada. Though National Lead was represented on the board of British Titan when these agreements were made, they were not made at the instance of Jebsen or National Lead (or Titanine) but were made by British Titan, acting independently, with reference to business and legal considerations respecting which neither National Lead (or Titanine) nor Jebsen had responsibility or influence. In view of war conditions existing in 1941, British Titan and Laporte at the instance of the British Government agreed upon a quota arrangement under which British Titan was assigned 80% and Laporte 20% of sales in the British market.

34. The British agreements and arrangements described above were shaped by political, economic, and legal considerations which may be stated as follows:

(a) By the late nineteenth century the combination movement had progressed considerably in England and was highly successful in a number of industries. Robert Liefmann in a study made in 1897 listed forty international cartels in which German companies participated, 255 twenty-two of which were formed in combination with British enterprise. Moreover, as the competitive advantages of large size became more apparent, and especially as the financial success of monopolies resulting from the combination of a few powerful firms became obvious, a large number of huge industrial mergers took place. The control of the market exercised by the merged enterprises was further strengthened in many cases by cartel agreements with the companies that remained outside. Even in that most competitive and subsequently sickest of British industries, coal mining, a national monopoly was proposed as early as 1893. It was followed in 1896 by D. A. Thomas's proposal to cartelize the coal industry. World famous instances of the evolution of concentration can be found in banking, in soap manufacture, petroleum refining and distribution. The cartel movement penetrated many minor industries as well.

(b) The basic source of information regarding industrial combination in England immediately after the First

World War is the Report of the Committee on Trusts, presented to Parliament in 1919. The following quotations are from the report (Cd. 9236, H. M. Stationery Office, 1919):

"We find that there is at the present time in every important branch of industry in the United Kingdom an increasing tendency to the formation of Trade Associations and Combinations, having for their purpose the restriction of competition and the control of prices." (p. 2)

"... we are satisfied that Trade Associations and Combines are rapidly increasing in this country, and may within no distant period exercise a paramount control over all important branches of the British trades" (p. 11)

The Report was unanimous. The four "liberal" members, Mr. Ernest Bevin, Mr. J. A. Hobson, Mr. W. H. Watkins, and Mr. Sidney Webb wrote an Addendum, as follows:

"We have signed the above Report because we find nothing to disagree with in its recommendations; but we feel that it does not adequately express the gravity of the situation, . . ."

256 It continues in part as follows:

"The fact is that Free Competition no longer governs the business world. . . ."

"We do not suggest that any action should be taken to prevent or obstruct combination or association in capitalist enterprise. Apart from the experience that no such interference can be made effective, we have to recognise that association and combination in production and distribution are steps in the greater efficiency, the increased economy, and the better organisation of industry. We regard this evolution as both inevitable and desirable . . ." (p. 13)

(c) The strong statements of the Committee on Trusts indicate the progress of cartelization and trustification of England during the decade of the First World War. The requirements of the war economy promoted the concentration of industry, for which conditions were propitious anyway. While after the war the purposes of the wartime combinations disappeared, the institutional changes remained. The big companies continued to grow bigger and the small companies continued to strive for agreements with competitors and for mergers in order not

to go under in the competitive struggle. This latter factor became of considerable importance after 1921, when England failed to recover from the post-war slump, and chronic unemployment appeared for the first time as an identified malady of modern industry. The transitional difficulties of the post-war period provided a powerful incentive for defensive measures on the part of industry. Many mergers and cartels were aimed at diversifying risks or controlling markets in times of depression. This was especially the case with many combinations in British industry, which was pervaded by a justified feeling that it was losing out in the international competitive race with the more modern industries of the United States, Germany, Japan, and even of the smaller European industrial countries like Belgium, Sweden, and Switzerland. Whatever the specific causes, the results were the same.

257 A large further growth of concentration in British industry occurred during the 1920s. Many enormous mergers took place, e. g., in the steel industry and in chemicals. Sometimes these mergers were government-sponsored, e. g. in communications and in railroads. In the field of chemicals, to quote Clapham, *An Economic History of Modern Britain* (Macmillan, N. Y., Cambridge University Press, 1938), Vol. III, pp. 535-6,

"The greatest of the new amalgamations, Imperial Chemical Industries, already had a half-public character, built up as it was with the good wishes and, so far as its inherited function of making the country independent of fine imported dyestuffs went the help, of the State."

In 1926 a Royal Commission on the Coal Industry recommended amalgamation as a cure for the ills of the coal industry. (Cd. 2600.) The Coal Mines Act of 1930 put a Coal Mines Reorganization Commission in operation. (Levy, *The New Industrial System*, London, 1936, p. 187.) The great mergers in banking continued apace, resulting eventually in a virtual merging of the entire general commercial banking system of Great Britain in five large institutions. (Report of the Treasury Committee on Bank Amalgamations, 1918; Clapham, *op. cit.*, Volume III, pp. 537-8.) Both the mergers and cooperation between the merged institutions developed with the unofficial sanction of the Bank of England and the British Treasury. The first government-sponsored cartel appeared in 1922, when the notorious Stevenson plan for the control of rubber production was put into operation.

A brand new, subsidized beet sugar manufacturing industry was established in 1925 by special legislative enactment (British Sugar Subsidy Act of 1925).

(d) By 1926 the Liberal Party was thoroughly alarmed by the challenge to orthodox liberalism inherent in post-war developments. It appointed a committee to study the situation, including W. T. Layton, the editor of *The Economist*, Lloyd George, H. D. Henderson, Philip Kerr (subsequently Lord Lothian), J. M. Keynes, Sir Herbert Samuel, Sir John Simon, R. H. Brand, D. H. Robertson,

258 Sir Josiah Stamp, and others less well known in the United States. These men constituted the intellectual leadership of the Liberal Party and in a large measure that of England. Their report was published after eighteen months of deliberations, entitled *Britain's Industrial Future being the Report of the Liberal Industrial Inquiry*. It commands great attention, reflecting the ideas of leading English liberals and academicians as to how much of the liberal ideology of the nineteenth century could be salvaged. Chapter VIII of the report is devoted to trusts and trade associations. The report states that

"this very proper objective [the protection of the public interest] is not to be secured in these days by mere attempts to restore the old conditions of competition, which often involve waste and effort, the uneconomic duplication of plant or equipment, and the impossibility of adopting the full advantages of large-scale production.

"In modern conditions a tendency towards some degree of monopoly in an increasing number of industries is, in our opinion, inevitable and even, quite often, desirable in the interests of efficiency. It is, therefore, no longer useful to treat trusts, cartels, combinations, holding companies, and trade associations as inexpedient abnormalities in the economic system to be prevented, checked, and harried. The progression from purely private individualistic enterprises to the Public Concern is one of endless gradations and intermediate stages. . . ." (pp. 93-4)

(e) By the end of the decade British industry was among the leaders of the world-wide concentration movement. It exercised a tight control over its domestic and imperial markets. In addition to the growing complexity of industrial production, marketing, and trade, the tariff protection of key industries, which was enacted after the World War, considerably assisted trustification and cartelization. The tariff protection of industries had begun

with the McKenna Duties of 1915—33 $\frac{1}{3}$ % on motor cars, cycles, clocks, watches, musical instruments, and a flat rate on films. The Key Industries Duties of 1921 applied the same rate of 33 $\frac{1}{3}$ % to many instruments and
259 chemicals, and 50% to optical instruments and magnetos. These were the first breaches in the free trade system of England, where the only duties previously known were a few levies raised for revenue (e. g. on tobacco). The profit possibilities to be derived from economic concentration were enhanced by the tariff which raised the delivered price of potentially competitive imports.

(f) The highly tolerant view British legislation and courts took with respect to restraints of trade, the narrowness of their interpretation of what was an unreasonable restraint, and their refusal to consider any but the most specific evidence, contributed to the development of highly restrictive practices throughout British industry. This meant that what would be considered competitive behavior in the United States was at a discount and would have tended to provoke violent retaliation by an entire industry against the aggressor enterprise. A tacit code of non-competitive industrial discipline was built up which was and is of the greatest effectiveness.

(g) Economic concentration developed during the 1920s largely in a haphazard manner. It developed as and when conditions permitted. During the 1930s two major changes occurred, both of which propelled industry further in the direction of concentration and coordination. First was the adoption of protectionist foreign trade policies. England adopted a fullfledged protectionist tariff in 1932. At the Ottawa Conference in the same year, moreover, a system of imperial preference was established which went far to guarantee the Imperial market for British manufactured products. Having become a protectionist country, England enabled a number of her industries, in which previously the absence of a tariff enforced some measure of competition, to reduce their competitive activities. The tariff rates imposed in 1932 were: a blanket 10% ad valorem on imports, excepting raw materials on the free list, and manufactures. The latter were mostly taxed at 20%, furs and jewelry at 30%, iron and steel products at 33 $\frac{1}{3}$ %. An Import Duties Advisory Committee was also formed to advise the Treasury on tariff questions. The Committee interpreted its task as essentially protective and has
260 advised the Treasury accordingly in most cases. The Treasury had tended to follow the advice it re-

ceived: The second major development was the growing conviction that cartels, trusts, and other forms of industrial agreements and mergers are helpful tools of British national policy. Compulsory cartelization was attempted in cotton spinning, coal, and steel, among others. The British Government took an active interest in the international steel cartel negotiations, it made tariff and quota protection of the industry conditional on rationalization and reorganization, it backed the numerous international commodity agreements that involved British Empire producers. The British Iron and Steel Federation was first organized in 1934. The Sugar Industry Reorganization Act of 1936 enacted a compulsory merger of all beet sugar manufacturing companies in the British Sugar Corporation, Ltd., which was to be privately owned and was allowed a maximum of 7% dividend on its common stock. It was also during this period that the Federation of British Industries became a major power in Great Britain. The Federation of British Industries published an undated pamphlet entitled "Industry and Action", in which the Federation boasted of its influence on British fiscal policy and commercial policy. The influence of the Federation on import duties, and its success as a channel of consultation with the government in commercial treaty negotiations, are particularly emphasized.

(h) With the German example before their eyes, British Government officials and corporation executives became increasingly aware of the advantages to the execution of national policies that could be derived from industrial organization. They saw that monopolistic agreements among raw materials producers were a very effective way to increase the total proceeds of exports, and the total revenues accruing therefrom both to the producing interests and to the national economy as a whole. These considerations were powerful in the formation of raw materials cartels throughout the British Empire, such as the rubber cartel, the tin cartel, and numerous other agreements among British Empire producers. They also became aware of the advantages of regulating trade and payments

261 relations between England and foreign nations on a comprehensive basis, in which regulations organized trade played a considerable part. Among the first of such English payments agreements was the one negotiated with Argentina in 1933, the so-called Roca-Runciman Agreement. There were a number of subsequent agreements before 1939. A whole network of them was put into operation quickly after the outbreak of the war.

(i) Current indications are unanimously in the direction of cartelization in the post-war organization of British industry. An article by Mr. Geoffrey Crowther, editor of *The Economist*, in the latest issue of the *Yale Review*, Winter 1945, points in that direction. The British delegation to the International Chamber of Commerce Conference at Rye, New York, in November 1944 clearly indicated that this was its position. As early as December 1942 the Commission to study the Organization of Peace published a study of British Business Associations on Post-war Reconstruction which even then strongly indicated this much. British Government action has hitherto not given any signs of reversing the previous trend towards government-encouraged cartelization of private industry. Indeed, all its actions towards post-war planning and reconversion planning indicate that it expects to pursue a vigorous policy of intervention in economic affairs. Integration of industries in cartel forms is an inevitable concomitant to such a policy, short of outright nationalization. In other words, tight organization of British industry, which has been forged for purposes of the war economy, is not likely to be abandoned in favor of a freely competitive system after the war. On the contrary, it seems that the British Government will take an active part in the leadership of the industrial combination movement. The policy will be one of active government participation in business, including participation in and cooperation with industrial combinations, rather than one of checking and controlling them from the outside.

(j) Subsequent to the hectic years immediately following the First World War foreign nations were able to import vast quantities of materials for reconstruction and development purposes, largely financed by loans from the United States. The resultant business activity provided a powerful stimulus to world recovery during the years 1924-29. Subsequent to 1929 there occurred a drastic reduction in the total supply of dollars available to foreigners. The reduction resulted from the cessation of foreign lending and the drop in imports into the United States that was caused partly by the beginning of the depression, partly by the Hawley-Smoot Tariff. Since dollars and sterling were the principal media for the financing of international trade, and sterling itself was endangered by the shortage of dollars that developed, the effects of this dollar shortage on international trade were catastrophic. In the United States the quantity of imports continued to be closely related to industrial production.

Their value declined faster than national income only because of the greater price decline of internationally traded commodities. The quantity of imports into foreign countries dropped disproportionately as compared to their industrial production; and their imports from the United States dropped much faster than their total imports. In other words, under the impact of the world-wide dollar shortage there was a drastic reduction in the ratio of world trade to world production, and a further reduction in the proportionate share of the United States in total international trade. The methods by which the use of dollars was restricted in foreign countries were numerous and sophisticated. Their primary objective in each case was to reduce total imports from the United States and to substitute for them either domestic production or at least imports from other sources. Helping to reduce both the dollar shortage and domestic unemployment in one fell swoop was usually the official policy.

(k) In the United Kingdom the abandonment of the gold standard in September, 1931, immediately made goods from the United States and Germany 33% more expensive and eventually 50% more expensive than they had been prior to the devaluation of the pound. This situation was rectified by the devaluation of the dollar in 1934, but in the meantime, in 1932, Great Britain established a new protective tariff and Imperial preference; she progressively strengthened her economy on bilateral and exclusive patterns, which tended to discriminate against American goods. "Buy British", by no means a new slogan, received added popularity. The Federation

263 of British Industries and lesser trade associations made determined efforts to organize British markets so as to present maximum resistance to foreign merchandise. Renewed impetus was given to cartelization among the exporting industries and raw material producers of the British Empire—whose best customer was the United States—so as to maximize the dollar proceeds of export sales by a monopolistic price policy.

(l) The dollar shortage ceased to be acute in England after 1934. The combined effect of the protective tariff, Imperial preference, and the raising of the price of gold in the United States which accrued largely to the benefit of the gold producers of the British Empire) was to ease considerably the foreign exchange situation. Sterling once more became a reasonably safe currency. By then, however, the damage was done. While imports from the

United States revived, they never attained previous totals. After 1937 new pressures developed on the dollar resources of England, partly as a result of the renewed slump in the United States, which cut down all our imports, and partly owing to rearmament needs.

CONCLUSIONS OF LAW

C15. A reasonable, if not the only, means by which Titanine (National Lead) could participate on a practical, profitable basis in the manufacture and sale of titanium pigments in England and throughout the British Empire (except Canada, Newfoundland, and certain other areas), and at the same time secure the right to use British inventions and obtain the benefits of great technical and marketing facilities and experience,—particularly inventions, facilities, and experience of I.C.I.,—the British agreements did not restrain—they promoted—commerce in titanium pigments.

C16. Made for the purpose of establishing a new business on a sound basis,—of securing great technical and commercial advantages not otherwise available,—the British agreements were not intended to, and did not affect prices in the United States or otherwise deprive 264 purchasers in the United States of the advantages of competition.

C17. An arrangement respecting British commerce, the British agreements did not directly and materially affect United States commerce, and they are not subject to regulation under the Sherman Act.

C18. In so far as the British agreements involved the extension or application, by or on behalf of National Lead or Titanine, of features of the 1920 agreement to areas within the territory of Titan A/S (Titanine), they constituted a reasonable exercise of patent rights.

C19. The Court will not cancel or require cancellation of the British agreements for the following reasons:

(i) They involve British companies not before the Court whose material interests would be adversely affected.

(ii) They relate wholly to business in foreign countries.

(iii) The parties have agreed to revise the agreements so as to eliminate therefrom the territorial and other restrictions and do not intend to resume the same.

[United States v. United States Steel Corporation et al., 251 U. S. 417, 444-5; Standard Oil Company (Indiana) et al. v. United States, 283 U. S. 163, 181-2.]

VII. THE EUROPEAN AGREEMENTS (1933-1935)

35. Joseph Blumenfeld, a chemist and managing director of Societe de Produits Chimiques des Terres Rares, a French company which he owned stock, prior to 1922 obtained certain patents relating to the manufacture of titanium compounds which he assigned to Terres Rares. Between 1922 and 1933 Terres Rares granted exclusive licenses to Fabriques de Produits Chimiques de Thann et de Mulhouse, a French company, for France, its colonies, dependencies, protectorates, and mandated territories; to Societa Anonima Titanium (Montecatini), the largest chemical company in Italy, for Italy, and non-exclusive licenses for Belgium, Holland, Switzerland, Spain, Portugal, and South America, subject to rescission on three months' notice; to Verein für Chemische und Metallurgische Produktion Aussig, the largest chemical company in Central Europe, for Czechoslovakia, Austria, Hungary, Yugoslavia, Rumania, and, subject to certain obligations, Danzig and Denmark, and non-exclusive licenses for Poland and Russia; and to Laporte for the British Empire. Terres Rares sold its United States titanium patents to Commercial Pigments Company, a United States corporation; these patents were later acquired by du Pont.

36. Jebsen, confronted with the economic and political problems indicated below, acting for Titanine, either made or approved agreements among the European producers of titanium as follows:

(a) In 1933 Aussig and Titangesellschaft entered into an agreement which established a sales quota of approximately 25% for Aussig and 75% for Titangesellschaft in Germany, Czechoslovakia, Poland, Austria, Hungary, Yugoslavia, Rumania, and Russia. Prices were to be fixed by mutual consent, but not so high as to impair sales, and were not required to be identical, so that each firm could compete with dealers in other pigments (lithopone, zinc oxide, white lead, &c.) as local conditions might permit. Each gave the other the right to use its product patents and agreed to support the other in protecting these rights. Aussig agreed to buy from Titangesellschaft at preferential prices any requirements of titanium pigments, above Aussig's then production capacity, which Aussig might need to meet its quota. (This provision, made to enable Titangesellschaft to reduce costs through increased production and Aussig to buy at a favorable price, was

effective only until Titangesellschaft's capacity was fully utilized.) Responsibility for the quality of the products was to rest on the manufacturer.

(b) Sometime in 1935, but to take effect as of May 1, 1934, an agreement known as the Contrat a Quatre was made between Thann & Mulhouse and Terres Rares, 266 on the one hand, and Societe Industrielle and Titanine, on the other, which established a quota of 30% for Thann & Mulhouse and Terres Rares and 70% for Societe Industrielle and Titanine in Belgium, Holland, and "various countries" (Esthonia, Latvia, Lithuania, Abyssinia, Liberia, Arabia, Afghanistan, Persia, and Siam) and a 50% quota for each group in France; prices for these territories were to be fixed by mutual consent; product patents of each party were to be made available to the other parties. This agreement could be terminated by a change of sales possibilities resulting from governmental measures, from "new competition", or from "any governmental or legislative measures making it partly or wholly illegal". Otherwise it could not be terminated before December 31, 1938, and then only on six months' notice. Thereafter it was to continue for two-year periods unless notice was given six months before the expiration of any such period. This agreement was related to the Contrat a Six (see below) and could be terminated on three months' notice if that agreement was terminated.

(c) At the same time an agreement known as the Contrat de Livraisons (agreement concerning mutual deliveries) was made between the same parties and provided that each group would supply the other with any titanium pigments which it might have available after its own needs were satisfied, at certain fixed prices and on certain terms. It was agreed that goods delivered by one group to the other could not be reexported and that this obligation must be imposed on the customers of the parties.

(d) An agreement known as the Contrat a Six was also entered into at this time by Thann & Mulhouse, Terres Rares, Montecatini, Titanine, Societe Industrielle, and Titangesellschaft, in which Titangesellschaft and Aussig were given exclusive rights of sale and delivery in Germany, Danzig, Czechoslovakia, and Russia; Titangesellschaft, Terres Rares, and Thann & Mulhouse in Spain, Portugal, Japan, Switzerland, Bulgaria, Greece, Turkey, China, and South America (subject to Titanium Pigment's rights in South America); Terres Rares, Thann & Mulhouse, and Societe Industrielle in France; Terres

267 Rares, Thann & Mulhouse, and Titanine in Belgium, Holland, and "various countries" (as defined above); Montecatini in Italy; Titanine in Norway, Sweden, and Finland; and Titanine and Aussig in Denmark. Each party agreed to respect the others' exclusive rights. This agreement had the same termination provisions as the Contrat a Quatre, and was terminated by Montecatini on December 31, 1938.

37. The European agreements and arrangements described above were shaped by political, economic, and legal considerations which may be stated as follows: In 1927 a World Economic Conference was called by the League of Nations for the purpose of discussing and, if possible, taking steps to cure the economic ills of Europe caused by World War I. The war had created new frontiers; and industry fell within these new frontiers in a completely haphazard and unplanned way. For example, the industries of Bohemia, established for a market of 50 million people, found themselves with 13 million Czechoslovakians as their domestic market; they had to seek an outlet for excess production. Tariff barriers were erected and import license systems inaugurated to protect domestic manufacture; and countries with weak currency subsidized export industries in order to bolster their currency. These economic complications, characteristic of Europe in the 20's and 30's, led to cartelization to protect domestic industry, including the prevention of dumping by companies subsidized by their governments. Any company wishing to do business in Europe at the time was forced to come to terms with domestic industry.

CONCLUSIONS OF LAW

C20. Arrangements relating only to European commerce, these agreements did not directly and materially affect United States commerce and are not subject to regulation under the Sherman Act.

C21: In so far as these agreements involved the extension or application of features of the 1920 agreement to areas within the territory of Titan A/S, they constitute a reasonable exercise of patent rights.

268. C22. The Court will not cancel or require cancellation of the agreements for the following reasons:

(i) They involve European companies not before the Court whose interests would be adversely affected and whose future will be determined by decisions of the Allied Governments.

(ii) They related wholly to business in foreign countries.
 (iii) The executory features of the agreements were terminated by the war.

(iv) So far as National Lead and Titanine may be involved, the agreements were terminated by act of war when the United States declared war on Germany and Japan.

C23. The agreements were made in accordance with European practices and laws.

VIII. THE JAPANESE AGREEMENTS (1936)

38. Because of increasing difficulty with Japanese tariffs and import licenses, and because of the probability of independent manufacture of titanium products in Japan and the dumping of the products on world markets, a pool agreement was made in 1936 by Terres Rares, Titanine, and I.G., under which Terres Rares and Titanine, together with the Japanese firm of Kokusan Kogyo, undertook to form a new company, Titan Kogyo, for the purpose of erecting a titanium factory in Japan. The Japanese firm was to own 50% of the new company, Terres Rares 30% and Titanine 70% of the remaining 50%. I.G. was to have an option on one-half of Titanine's shares. Terres Rares and Titanine authorized Doitsu (I. G.'s selling agency in Japan) to act as trustee for them in the new Japanese company. This agreement was to last as long as any of the parties owned stock in Titan Kogyo. (The proportionate interests of the parties in the Japanese market had been determined by the European agreements described above.)

269 39. Doitsu and Kokusan Kogyo agreed that Titan Kogyo would be licensed under Titangesellschaft and Titanine Japanese patents in substantially the same manner and subject to the same terms as in the German and British agreements described above. Titan Kogyo was given an option on Blumenfeld's Japanese patents in exchange for certain rights to be given Terres Rares and Thann.

CONCLUSIONS OF LAW

C24. Arrangements relating only to Japanese commerce, the agreements did not directly and materially affect United States commerce and are not subject to regulation under the Sherman Act.

C25. In so far as the agreements involved the extension or application of features of the 1920 agreement to areas

within the territory of Titan A/S; they constitute a reasonable exercise of patent rights.

C26. The Court will not cancel or require cancellation of the agreements for the following reasons:

(i) They involve European and Japanese companies not before the Court whose interests would be adversely affected and whose future will be determined by the Allied Governments.

(ii) They related wholly to business in foreign countries.

(iii) The executory features of the agreements were terminated by the war.

(iv) So far as National and Titanine may be involved, the agreements were terminated when Japan declared war on the United States.

C27. The agreements were made in accordance with Japanese and European law.

IX. THE CANADIAN AGREEMENTS (1937)

40. National Lead owned certain Canadian patents and, by virtue of the 1920 agreement, had an exclusive license and the right to grant sublicenses under Titan A/S's

270 Canadian patents. Before 1937 National Lead supplied the Canadian market through Wilson, Paterson & Gifford, and permitted British Titan to sell through the same agency. Sales were small and the market undeveloped in relation to rival pigments, such as lithopone, white lead, and zinc oxide. Beginning in 1935, National Lead, realizing the need for a strong local alliance, began negotiating with Canadian Industries, Ltd. (C.I.L.), the largest chemical company in Canada, 90% of whose stock is owned by I.C.I. and duPont in equal shares, for the purpose of forming a company to manufacture and sell titanium pigments and compounds in Canada. As a result of these negotiations four agreements were made in 1937, as follows:

(a) There was an agreement between C.I.L. and National Lead under which a new company, Canadian Titanium Pigments, Ltd., was granted the sole right to manufacture and sell under C.I.L.'s and National Lead's titanium patents in Canada and Newfoundland. Canadian Titan was to be owned 49% by National Lead and 51% by C.I.L. In addition, National Lead was to receive 8000 shares of non-voting (except under certain conditions) \$100 par value stock in consideration of its existing good will, patents, and technical information. National Lead and C.I.L. agreed to subscribe to bonds of Canadian Titan

for the purpose of erecting a factory; but because of World War II the bonds have not been issued and the factory has not been built. Canadian Titan was to have six directors, three nominated by National Lead and three by C.I.L.; one of the C.I.L. directors was to be president. Until the factory was built National Lead agreed to supply Canadian Titan at cost plus 10% and to use its best efforts to enable Canadian Titan to purchase from British Titan at cost plus 10%. The agreement was to remain in force for thirty years, and thereafter could be terminated on twelve months' notice by either party. If at the end of thirty years either party wished to withdraw from the agreement, it was required to offer its shares to the other party at book value. (In determining book value good will, patents, and future earnings were not to be considered.)

(b) It was agreed that National Lead and Canadian Titan would exchange licenses, patent applications, 271 and technical information in accordance with the principles of the 1920 agreement above described.

No restrictions were placed on the sale of finished products by the customers of either party. Both National Lead and Canadian Titan could grant sublicenses; and in order to insure the widest development of the field, sublicensees were required to grant licenses under their present and future patents to the grantor.

(c) C.I.L. and Canadian Titan entered into a similar agreement.

41. In 1937 Canadian Titan entered into a contract with Laporte under which Laporte transferred to Canadian Titan all the Canadian titanium patents which it then owned, and further agreed to license Canadian Titan under any such patents which it might acquire during the life of the contract (fifteen years).

42. Negotiations are in progress among National Lead, C.I.L., and Canadian Titan to revise the Canadian agreements on lines similar to the revised British agreements.

CONCLUSIONS AT LAW

C28. A reasonable, if not the only, means by which National could participate on a practical and profitable basis in the manufacture and sale of titanium pigments in Canada and Newfoundland, and at the same time secure the right to use Canadian inventions and obtain the marketing facilities and experience of C.I.L., the Canadian agreements did not restrain—they promoted—commerce in titanium pigments.

C29. Made for the purpose of establishing a new business on a sound basis,—of securing commercial advantages not otherwise available,—the Canadian agreements were not intended to, and did not, affect prices in the United States or otherwise deprive purchasers in the United States of the advantages of competition.

630. An arrangement respecting Canadian commerce, the Canadian agreements did not directly and
272 materially affect United States commerce, and they are not subject to regulation under the Sherman Act.

C31. The Court will not cancel or require cancellation of the Canadian agreements for the following reasons:

(i) They involve Canadian companies not before the Court whose material interests would be adversely affected.

(ii) They relate wholly to business in a foreign country.

(iii) The parties are negotiating a revision of the agreements so as to eliminate therefrom the territorial and other restrictions and do not intend to restore the same.

X. THE DU PONT AGREEMENTS (1931-1941)

43. Before 1931 United States rights under the Blumenfeld patents were held by Commercial Pigments; from 1931 to 1935 by Krebs Pigment and Color Corporation, a Delaware company owned 70% by du Pont; after 1935 by du Pont, to which manufacturing assets of Krebs were assigned in 1935. Krebs was dissolved in 1943, and since then du Pont has conducted all of its titanium pigments operations through its Pigments Department.

44. Between 1920 and 1931 sales of titanium pigments by National Lead slowly but steadily increased. In 1931 it sold 8000 tons (in terms of TiO_2 content). While sales of all pigments declined in the depression year 1932, sales of titanium pigments fell off relatively little, and sales by National Lead of titanium pigments exceeded total sales of white lead by all manufacturers. Titanium pigments were on the way to overtake zinc oxide and even lithopone. Engaged in the pigments and paint business on a large scale, du Pont saw the handwriting on the wall and set out to acquire patent rights and technical information necessary to manufacture efficiently and economically a full line of titanium pigments and thus to compete successfully in a potentially large domestic market.

273 45. Looking into the patent situation, du Pont found that the Blumenfeld patents, though important, were incomplete and inadequate. For example, the Barton-Rossi-Jebesen patents held or controlled by Titanium Pigment (National Lead) stood in the way of manufacture of composite pigments, for which there appeared to be a substantial potential demand, and of use by Krebs (du Pont) of the cheap sulphuric acid attack process disclosed by Jebesen. Indeed, du Pont found that Commercial Pigments was then infringing patents held or controlled by Titanium Pigment (National Lead), and that plans then under consideration for more extensive operations would, if carried out, entail further infringement. It was not all one way, however. Blumenfeld disclosed processes which were attractive to National Lead. (National Lead was particularly interested, for example, in processes by which Commercial Pigments and Krebs had been able to improve the quality of titanium dioxide.) And it was seriously claimed by du Pont that National Lead was infringing patents owned or controlled by Krebs (du Pont).

46. The record is replete with evidence of serious controversy between National and du Pont over patent rights, of the probability of protracted and costly litigation, and of a genuine desire on the part of the two companies to effect a reasonable settlement of their differences in order that both might safely go forward on a sound technical basis with the development, manufacture, and sale of a relatively new competitive product.

47. Having decided to settle their differences, and to release and expand the art, rather than to attempt to destroy each other, Titanium Pigment (National Lead) and Krebs (du Pont) entered into an agreement as of January 1, 1933 as follows:

(a) They exchanged irrevocable, non-exclusive licenses, within the United States, to use all processes, methods, and apparatus relating to or in the "licensed field", whether or not patented or subject to patent, then or thereafter owned by them or otherwise at their disposal, with the right to sell products resulting from the exercise of such licenses in the United States, its colonies and possessions, Mexico, Central America, the West Indies, and South America.

274 (b) They agreed to exchange technical information and experience.

(c) Each party agreed to assist the other to acquire

an irrevocable, non-exclusive license, for the territory above described, under any patent or applications owned by or otherwise at the disposal of other persons, under which such party itself was licensed; and Krebs (du Pont) agreed that it would offer to any foreign associate of Titanium Pigment (National Lead or Titanine), before offering to any other person, the opportunity to acquire, upon mutually satisfactory terms and conditions, an irrevocable, non-exclusive license under any patent relating to the "licensed field" issued in any country of Europe or in Great Britain which then was or thereafter might be owned by or otherwise at the disposal of Krebs (du Pont).

(d) It was provided that the agreement might be terminated at any time after December 31, 1933 on three years notice, but not so as to affect licenses theretofore acquired.

(e) There was a mutual release of claims for infringement.

48. As of about May 1, 1940 the exchange of technical information between National and du Pont was discontinued; and the 1933 agreement between Titanium Pigment and Krebs, which had been assumed by National and du Pont, respectively, was, by an agreement between National and du Pont dated January 1, 1941, amended to eliminate provisions for exchange of technical information.

49. In each of the years 1937 to 1941, inclusive, du Pont and Titanine entered into patent agreements involving specifically designated inventions under the terms of which du Pont granted to Titanine exclusive licenses, with the right to grant sublicenses to one or more of the following, namely, Titangesellschaft, British Titan, Societe Industrielle, and, from 1939 to 1941 inclusive, to Titan Kogyo, under certain specified patents and patent applications of du Pont in certain specified countries other than the United States relating to the manufacture of titanium compounds useful as pigments. Each of said licenses was only for the particular countries in which the licensed patents and applications were issued or pending; 275 du Pont reserved the right to use the inventions covered by such patents; and Titanine, with the consent of National Lead, granted du Pont non-exclusive licenses under certain specified United States patents and applications.

50. The 1933 agreement between Titanium Pigment (National Lead) and Krebs (du Pont) involved a substantial,

material deviation (by Titanium Pigment) from the principles and terms of the 1920 agreement between Titanium Pigment and Titan A/S, in that, in addition to granting licenses to Krebs (du Pont) under United States patents of Titanium Pigment (National Lead), the 1933 agreement granted sublicenses to Krebs (du Pont) under the United States patents of the parties to the French, German, and British agreements above described (other than Titan A/S or Titanine) and their licensees, without at the same time securing for such parties and their licensees reciprocal rights in their respective territories under the patents of Krebs (du Pont) in such territories, and without securing the agreement of Krebs (du Pont) not to manufacture in or import into such territories. It was necessary, therefore, to secure the approval of the 1933 Krebs (du Pont) agreement by the parties (other than Titanium Pigment) to the French, German, and British agreements; and such approval was obtained.

51. The 1933 Krebs (du Pont) agreement was negotiated chiefly by Rupprecht for du Pont and by Beschorman for National Lead. Rupprecht is dead. Owing to his retirement, illness, and residence in California, Beschorman was not called to testify at the trial. Letters written by Rupprecht and Beschorman, however, indicate that, while Rupprecht informed Beschorman that in view of patent and commercial considerations du Pont was not likely to manufacture in or import into the foreign territories referred to above, du Pont would not, and was advised and believed that legally it could not, agree to refrain from such manufacture or importation.

52. While Jebson had been notified by representatives of National Lead of the negotiations with du Pont, his office and residence were at Paris, his authority and responsibility were confined to European operations in which Titanine (National Lead) was interested, he did not participate in the negotiations with du Pont, and he was not asked to and did not approve of the form of agreement with Krebs (du Pont). Indeed, Jebson regarded the proposed Krebs (du Pont) agreement as a radical and unfortunate departure from the principles and terms of the 1920 agreement, and he so advised National Lead.

53. After the 1933 Krebs (du Pont) agreement had been negotiated, however, Jebson was instructed by National Lead to secure the approval thereto of the French, Ger-

man, and British companies with which the foreign agreements above described had been made; and, recognizing but not approving the deviation referred to, he proceeded to carry out the instruction. Jebson did not receive, nor did he understand that National Lead had received, any assurance that notwithstanding the terms of the agreement Krebs (du Pont) had accepted the principles and terms of the 1920 agreement, or had agreed or would agree to refrain from manufacture in or importation into the territories referred to. Never at any time—not in 1933, or 1938, or at any other time—did Jebson understand that du Pont had accepted the principles and terms of the 1920 agreement.

54. On the basis of the exchange of licenses and technical information between National Lead and du Pont, from 1933 on there was the most active-competition between the two companies—resulting in great improvements in manufacturing processes, a vast increase in sales, and repeated reductions in the price of titanium pigments.

55. While for obvious business reasons National Lead and du Pont have endeavored to match each other's titanium products, such products have never been identical, and each manufactures certain titanium pigments having special applications not manufactured by the other.

56. There has never been any allocation of territory or customers between National Lead and du Pont; and, indeed, each maintains a large, highly trained technical sales force engaged in endeavoring to capture the market for titanium pigments. To a very large extent the

277 salesmen of the two companies are chemists whose contact with consumers (that is, manufacturers of paint, rubber, glass, &c.) consists in demonstrating that their products merit acceptance on the basis of technical superiority. The buyers of titanium pigments are mainly well-informed, experienced purchasing agents, whose orders are placed solely on the basis of service and technical considerations brought to their attention by chemists and other technicians employed by consuming companies.

57. While National Lead and du Pont have followed each other's price reductions, on their commercially comparable products, such price following has been competitive and not collusive, and has resulted in repeated, substantial reductions of the price of titanium pigments to the purchaser.

CONCLUSIONS OF LAW

C32. None of the du Pont agreements is illegal per se.

C33. Made for the purpose of terminating a serious patent controversy, and of avoiding protracted, costly, and wasteful patent litigation, the 1933 Titanium Pigment (National Lead)-Krebs (du Pont) agreement did not restrain—it promoted—commerce in titanium pigments.

[Standard Oil Company (Indiana) et al. v. United States, 283 U. S. 163, 171; United States v. Aluminum Co. of America et al., 44 F. Supp. 97, 113 (S. D. N. Y.).]

C34. A reasonable, if not the only, means by which du Pont could safely engage on a practical, profitable basis in the manufacture and sale of a full line of titanium pigments in competition with National Lead, the 1933 agreement enabled du Pont successfully to participate in and greatly to enlarge the market for titanium products, and thus to create and intensify competition.

C35. Made for the purpose, among others, of enabling National Lead to use du Pont's Blumenfeld processes, and of enabling du Pont to use National Lead's Barton-Ross-Jepsen processes, in competition with each other

278 the 1933 Agreement confirmed and strengthened the competitive position and capacity of National Lead, and it established and greatly increased the competitive position of du Pont, and thus enabled two large, successful companies to compete in the development of a relatively new industry.

C36. The du Pont agreements involved no allocation of markets or customers, or price fixing.

C37. The exchange of technical information by National Lead and du Pont between 1933 and 1941 tended to release and promote the development of the art, and thus did not constitute a violation of the Sherman Act.

C38. The separate agreements between du Pont and Titaninc made between 1937 and 1944 in relation to foreign patents of du Pont involved a reasonable exercise of patent rights and did not constitute a violation or violations of the Sherman Act.

C39. Neither Krebs nor du Pont ever accepted the principles or terms of the 1920 agreement between Titanium Pigment and Titan A/S, or ever agreed not to manufacture in or import into foreign countries; and the statements of Rupprecht on behalf of Krebs (du Pont) did not constitute a representation or agreement that Krebs (du Pont) would not engage in such foreign manufacture or importation.

XI. AMERICAN ZIRCONIUM AGREEMENTS (1934-1944)

58. In or about 1934 American Zirconium Company, which was owned 50% by Glidden Company and 50% by Metal & Thermit Corporation, began to manufacture titanium dioxide. National Lead notified Zirconium that it was probably infringing patents owned or controlled by National Lead, and in consequence Zirconium requested and received from National Lead a license under all United States patents owned or controlled by National Lead. National Lead and Zirconium each granted the other a non-exclusive license under its existing and future patents in the "licensed field"; Zirconium agreed to license National Lead, its licensees or sublicensees, under any present or future foreign patents of Zirconium; and in other respects the agreement conformed with the requirements of Article XIV of the 1920 agreement between Titanium Pigment and Titan A/S. At the request of Zirconium, National Lead accepted 10% of the common stock of Zirconium in lieu of royalties, and thereupon designated a representative to serve on the board of directors of Zirconium. National Lead exchanged technical information with Zirconium, it gave Zirconium engineering assistance in connection with the installation and use of its processes, and it licensed Zirconium to use pulverizing machinery available to National Lead and du Pont.

59. As a stockholder of Zirconium, National Lead gave Zirconium such advice and assistance as might reasonably have been expected; but National Lead lacked confidence in the management of Zirconium and from time to time endeavored to sell its Zirconium shares. Finally, in April 1944, at the request of Zirconium, the agreement was cancelled, the parties exchanged releases, and National Lead assigned its shares of Zirconium to Glidden.

CONCLUSIONS OF LAW

C40. Made for the purpose of enabling a new company to enter the titanium business in the United States, the Zirconium agreement did not restrain—it promoted—commerce in titanium pigments.

C41. In so far as the Zirconium agreement involved the application of features of the 1920 agreement, it constituted a reasonable exercise of patent rights.

C42. The agreement between National Lead and Zirconium having been terminated by mutual agreement, and

the parties having exchanged general releases, there is no issue, and the case is moot, in respect of Zirconium.

C43. National Lead did not restrain, or exclude, or attempt or conspire to restrain or exclude, Zirconium, and its relations with and relative to that company involved no violation of the Sherman Act.

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XII. VIRGINIA CHEMICAL (1937)

60. Some time prior to 1937 Virginia Chemical Company began the manufacture of titanium dioxide. Believing that Virginia Chemical was probably infringing its patents, National Lead so notified Virginia Chemical, and in consequence there were several conferences attended by technical employees of the two companies to determine what infringements, if any, were taking place. When it was determined by National Lead that Virginia Chemical was in fact infringing, National Lead offered Virginia Chemical a license under all its patents in the "licensed field" on a 2% royalty basis. This offer was refused, and no agreement of any sort has ever been made between National Lead and Virginia Chemical, and no suit for infringement has been instituted by National Lead.

CONCLUSION OF LAW

C44. National Lead did not restrain or exclude, or attempt or conspire to restrain or exclude, Virginia Chemical, and its relations with and relative to that company involved no violation of the Sherman Act.

XIII. PULVERIZING MACHINERY LICENSES (1939)

61. In 1939 National Lead undertook to adapt a patented machine known as the Micronizer Reduction Mill for use in the manufacture of titanium pigments. Following developments and changes by National Lead, the machine proved of substantial value as a means of improving the texture of titanium pigments; and National Lead secured an exclusive license, with the right to grant sublicenses, for titanium pigments manufacture, from the patentee, International Pulverizing Corporation. National Lead licensed du Pont and Zirconium and was willing to license any other company which had licenses under its titanium pigment patents. In October 1944 National Lead relinquished its exclusive license and took a non-exclusive license.

281 XIV. NEW YORK ILMENITE MINING DEVELOPMENT
(1941)

62. Owing to the impossibility of continuing to import ilmenite from India, in 1941 the Office of Production Management directed National Lead to open up a domestic source in Essex County, New York. National Lead was directed to, and did, offer participation in this project to each of the other producers of titanium pigments in the United States. The offer was accepted by du Pont. Thanks to the investment of more than \$10,000,000 by National Lead, and to its management, since about July 1942 there has been a domestic source of ilmenite sufficient for the demands of World War II. The directive of the Office of Production Management was approved by the Attorney General of the United States.

XV. NATIONAL LEAD PATENTS

63. The record contains digests of all Titanium Pigment and National Lead United States patents, all Titan A/S United States patents under which Titanium Pigment (National Lead) was licensed, and all Krebs and du Pont United States patents under which Titanium Pigment and National Lead were licensed. It contains, in the form of an Answer to Interrogatories, full information as to United States and foreign patents and applications owned by or licensed to Titanium Pigment or National Lead, and as to United States patents and applications used (that is, commercially used) by Titanium Pigment and National Lead.

64. While all of the patents owned by Titanium Pigment and National Lead were not commercially used; many of them were so used, and all of them were within the "stream of development". All of them were applied for (a few were acquired) in the normal flow of invention and improvement of the companies' own processes. None of them was applied for to prevent others from obtaining patents on inventions or improvements.

65. While some of the patents owned by or licensed to Titanium Pigment and National Lead expired by
282 1936, a number of important patents did not expire by that date, and have not yet expired; and National Lead has been engaged continuously, and is now engaged, in research and development work leading to further inventions and improvements in its "stream of development".

66. Apart from United States patents owned by or

licensed to National Lead and du Pont, there are other United States patents and sets of patents relating to the manufacture of titanium pigments owned or controlled, and in use, or in process of development, by Pittsburgh Plate Glass and by Sherwin Williams, both large manufacturers of paint. National Lead declined opportunities to acquire the patents referred to.

67. National Lead has never refused to grant licenses under its titanium pigment patents.

XVI. CONCLUSION

There is no evidence that National Lead or Titanine have been or are engaged in a combination in restraint of, or to monopolize, trade or commerce in titanium compounds among the several states of the United States or with foreign nations, or that they have been or are parties to contracts, agreements, or understandings in restraint of such trade or commerce, in violation of Sections 1 or 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2 (1940); and said defendants are entitled to a judgment dismissing the complaint as against them on the merits.

The foregoing Proposed Findings of Fact and Conclusions of Law are respectfully submitted on behalf of National Lead Company and Titan Company, Inc. While the suggested findings are intended to present a complete statement of the material ultimate facts, findings as to the Court's jurisdiction of the subject matter and of the parties and findings describing the defendants and alleged co-conspirators have been omitted in the interest of brevity on the assumption that appropriate proposed findings of this character will be submitted by counsel

283 for the plaintiff. Submitted in advance of oral argument and of an expression by the Court of its opinion concerning the facts and the law, the foregoing proposed findings and conclusions are necessarily tentative in the sense that it may seem desirable to suggest additional or alternative findings and conclusions, or to withdraw findings or conclusions herein suggested. For this reason, and otherwise to serve the convenience of the Court and counsel, the present proposals have been

printed in loose-leaf form so as readily to permit additions or substitutions.

March 1, 1945.

Respectfully submitted,

BETHUEL M. WEBSTER,
15 Broad Street, New York 5, N. Y.

CLIFTON P. WILLIAMSON,
120 Broadway, New York 5, N. Y.
Counsel for National Lead Company and
Titan Company, Inc.

EDWARD L. REA,
CAROLINDA WATERS,
Of Counsel

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In United States District Court

[Title omitted.]

*Proposed findings of fact and conclusions of law of
defendant, E. I. du Pont de Nemours and Company*

PROPOSED FINDINGS OF FACT

1. Du Pont entered the titanium pigment business in 1931, and since that date its plant capacity for manufacturing such pigments has been frequently expanded and the quantity of titanium dioxide produced by du Pont and the total quantity produced in the United States have substantially and steadily increased.

2. Du Pont prices for titanium pigments steadily and substantially declined in the period from 1931 to January 1, 1941.

3. Du Pont and National Lead have competed and do compete vigorously with each other and with others, including American Zirconium and Virginia Chemical, in the manufacture and sale of titanium pigments in the United States.

286 4. Du Pont has not exported titanium pigments in substantial quantities solely because of its own independent judgment as to the business undesirability of so doing made in the light of a number of economic, political and legal factors operating adversely to such exports.

5. Du Pont granted a license under its titanium pigment patents to each and every company which requested such a license.

6. Du Pont determined in 1931 to manufacture and sell titanium pigments as a development of its established white pigment business, by which time the titanium pigment art was already well developed, and patent positions had been established by both National Lead and Commercial Pigments, the only then existing titanium pigment manufacturers in the United States.

7. Du Pont did not assume the obligations or liabilities of Commercial Pigments toward the Blumenfeld Companies.

8. Du Pont was not substituted for Commercial Pigments in the negotiations Commercial Pigments was having in 1930 and 1931 in an effort to reach a worldwide agreement among titanium pigment manufacturers throughout the world.

9. Du Pont and Krebs never authorized or instructed Messrs. Ticknor or Chase to enter into any agreement on behalf of du Pont or Krebs with any titanium pigment manufacturer.

287 10. Du Pont did not agree, in July, 1933 or at any other time, with Joseph Blumenfeld, or any of the Blumenfeld Companies, that Krebs and du Pont, or either of them, would exchange technical information or would refrain from exporting titanium pigments outside the United States.

11. Du Pont did not subscribe to the Contract of 1920 or agree to accept its benefits and obligations.

12. Du Pont did not agree with National Lead prior to the execution of the Agreement of January 1, 1933, or at any other time, that it would refrain from exporting titanium pigments outside the United States.

13. Du Pont did not agree with National Lead prior to the execution of the 1933 Agreement, or at any other time, that the non-exclusive cross-licensing of patents therein provided for would in fact be on an exclusive basis.

14. Du Pont did not agree with National Lead or anyone else to prevent or attempt to prevent its customers from exporting titanium pigments outside the United States, Central or South America.

15. Du Pont and National Lead were engaged in a bona fide controversy concerning the validity and scope of the titanium patents respectively owned or controlled by them and whether such patents read on the operations of the other, and on August 28, 1933, du Pont entered into a written contract with National Lead, dated

as of January 1, 1933, to settle the mutual questions
288 of patent infringement which had arisen and which
seemed likely to arise between them.

16. Du Pont was granted a non-exclusive license by
the Agreement of January 1, 1933, under the patents
owned by Titan A/S which National Lead was using
and which it claimed du Pont was infringing in the patent
controversy preceding the execution of such agreement;
namely, United States Patent Nos. 1,288,863, 1,333,819,
1,333,849, 1,348,129 and 1,412,027.

17. Du Pont's exchange of technical information with
National Lead pursuant to the provisions of the Agree-
ment of January 1, 1933 progressively deteriorated until
eliminated at du Pont's request as of May 1, 1940.

18. Du Pont entered into a written agreement with
National Lead, dated as of January 1, 1941, which
amended the agreement between the parties of January
1, 1933 in certain respects, and said agreement embodied
the full and complete understanding between the parties.

19. Du Pont did not agree with Titan, Inc. in or about
June, 1938, or at any other time, to give Titan, Inc., at
its request, exclusive licenses to manufacture and sell
under all patents which du Pont then owned or might
thereafter acquire relating to the manufacture and sale
of titanium pigments for the territory in which Titan,
Inc. operated, or any of them.

20. Du Pont did not agree with Titan, Inc. in or about
June, 1938, or at any other time, that du Pont
289 would not exercise rights reserved to it in licenses
granted Titan, Inc.

21. Du Pont did not at any time agree to exchange
technical information with the foreign associates of Na-
tional Lead.

22. Du Pont did not agree with Titan, Inc. in or about
June, 1938, or at any other time, to confine its operations
in connection with the manufacture and sale of titanium
pigments within the United States and Central and South
America.

23. Du Pont did not agree with Titan, Inc. in or about
June, 1938, or at any other time, to prevent its customers
from exporting titanium pigments outside the United
States and Central and South America.

24. Du Pont and National Lead did not agree to use the
threat of infringement suits to compel either American
Zirconium or Virginia Chemical to accept a license, and
du Pont acted independently of National Lead in licensing

American Zirconium and Virginia Chemical under its titanium pigment patents and in negotiating adjustments and extensions of its license agreements with them dated January 1, 1935 and August 5, 1937, respectively.

25. Du Pont eliminated the quantity limitation provisions of the American Zirconium and Virginia Chemical licenses on November 10, 1944.

26. Du Pont did not enforce the quantity limitations formerly contained in the separate license agreements made by it with American Zirconium and Virginia Chemical, and such provisions have not in fact limited the production of either of such companies or prevented them from engaging in the manufacture and sale of titanium pigments on a commercially profitable basis.

27. Du Pont has competed in the sale of titanium pigments to South America and has not participated in any allotment of customers in South America.

28. Du Pont's acquisition and later abandonment or disposition of patents originally belonging to Auergesellschaft were independent transactions and were not carried out in furtherance of the alleged combination or conspiracy.

29. Du Pont did not, and does not now, control the supply of ilmenite ore available in the United States for the manufacture of titanium pigments and has made such ore available to competitive pigment manufacturers.

PROPOSED CONCLUSIONS OF LAW

1. Du Pont did not contract, combine, or conspire, to restrain trade or commerce in titanium pigments or compounds among the several States, or with foreign nations, in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

2. Du Pont did not monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce in titanium pigments or compounds among the several States or with foreign nations in violation of Section 2 of the Sherman Act (15 U.S.C. §2).

291 3. Alternatively, if it be concluded that at any time du Pont temporarily became a participant in, or illegally did any acts in furtherance of, any illegal contract, combination or conspiracy between any two or more of the other defendants or alleged co-conspirators, du Pont was disassociated therefrom and such participation and acts had ceased a substantial time prior to the filing of the complaint herein and prior to the commencement of

the Government's investigation, and there is therefore no ground upon which a court of equity may, or should enter a decree herein.

Respectfully submitted,

CRAVATH, SWAINE & MOORE,
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COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.
Attorneys for E. I. du Pont de Nemours
and Company.

WM. DWIGHT WHITNEY,
GERHARD A. GESELL,
JOHN LOGAN O'DONNELL,
NESTOR SHEA FOLEY,
Of Counsel.

MARCH 1, 1945.

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In United States District Court

[Title omitted.]

Plaintiff's proposed

FINAL DECREE

This cause came on to be heard upon the complaint and the answers thereto upon the evidence and upon argument of counsel. The Court having thereafter rendered and filed its opinion and having made and entered findings of fact and conclusions of law wherein the defendants have been found to have been engaged in a combination in restraint of trade and commerce in titanium pigments and compounds among the several states of the United States and of foreign nations, and that the defendants have been and now are parties to contracts, agreements and understandings in restraint of such trade and commerce in violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U.S.C.A. §§1 and 2):

Now, therefore upon motion of plaintiff by Wendell Berge, Assistant Attorney General, Herbert Berman and William C. Dixon, Special Assistants to the Attorney General, Julian Caplan and Ephraim Jacobs, Special Attorneys, and John F. X. McGohey, United States Attorney, for relief in accordance with the prayer of the complaint

and the defendants having severally appeared by counsel, it is ORDERED, ADJUDGED and DECREED as follows:

293. 1. The term titanium pigments or compounds as used herein shall be construed to mean any product containing 2% or more of the element titanium in a chemically, mechanically or physically combined state and mixtures thereof which can be used as pigments, whether or not adapted for other uses, and also extenders to be used in conjunction with such titanium compounds; and all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses, and also extenders to be used in conjunction with such titanium compounds.

2. The following abbreviations will be used to identify the defendants and co-conspirators:

NL	National Lead.
Tinc	Titan Company, Inc.
DP	E. I. du Pont de Nemours and Company, Inc.
TP	The Titanium Pigment Company, Inc.
Krebs	Krebs Pigment & Color Corporation
TAS	Titan Co. A/S.
IG	Interessengemeinschaft Farbenindustrie Aktiengesellschaft.
TG	Titangesellschaft, g.m.b.h.
SIT	Societe Industrielle du Titane.
ICI	Imperial Chemical Industries, Ltd.
GW	Goodlass Wall and Lead Industries, Ltd.
ISC	Imperial Smelting Corporation.
BTP	British Titan Products, Ltd.
NTP or Laporte	National Titanium Pigments, Ltd.
CIL	Canadian Industries, Ltd.
CTP	Canadian Titanium Pigments, Ltd.
Kokusan or KK	Kokusan Kogyo Kabushiki Kaisha.
TK	Titan Kogyo Kabushiki Kaisha.
Terres Rares	Societe de Produits Chimiques des Terres Rares.
Thann	Fabriques de Produits Chimiques de Thann et de Mulhouse.
Montecatini	Societa Anonima Titanium.
Aussig	Verein fur Chemische und Metallurgische Produktion Aussig.

3. The agreement dated July 30, 1920 between TP and TAS, (Exhibit A) thereafter assumed by the defendants NL and Tinc; the agreement between TP and Krebs dated January 1, 1933, thereafter assumed by the defendants NL and DP, and as amended by said 294 defendants on January 1, 1941 (Exhibits E and E3), are hereby adjudged to be unlawful under

Section 1 of the Sherman Act, and each of them is hereby cancelled and each of the defendants NL, Tinc, and DP, and all persons acting or claiming to act through, for or under them are hereby enjoined and restrained from the further performance of any of the provisions of said agreements.

4. The agreements dated July 30, 1920, between NL, TP, the Titanium Alloy Manufacturing Company and TAS (Exhibits A1 and A2), thereafter assumed by the defendant Tinc, are hereby adjudged to be unlawful under Section 1 of the Sherman Act, and the defendants NL and Tinc are hereby enjoined and restrained from the further performance of any of the provisions of said agreements.

5. The agreement between TAS and SIT dated March 3, 1927, (Exhibit B), assumed by defendant Tinc; the agreement between TAS and IG, (Exhibit C) dated October 3 and 20, 1927, assumed by defendant Tinc; the agreement between TAS and IG signed June 24 and October 20, 1927, (Exhibit C1), assumed by Tinc; the agreement between TAS and TG signed October 3 and 20, 1927, (Exhibit C3), assumed by Tinc; the agreement between TG and TAS dated October 3 and 20, 1927, (Exhibit C7), assumed by Tinc; the agreement between TG and TAS dated October 3 and 20, 1927, (Exhibit C8), assumed by Tinc; the agreement dated February 16, 1933 between ICI, ISC, GW and Tinc (Exhibit F); the agreements between Tinc, SIT, TR and Thann dated June 5 and 17, 1935, (Exhibits G1 and G2); the agreement between Tinc, TR, Thann, and IG; Tinc, TR, IG, Thann and DOITSU, both dated January 18, 1936, (Exhibits J and J2); the agreement between defendant NL and CIL dated January 1, 1937, (Exhibit K); the agreement between NL and CTP dated January 1, 1937 and as amended on February 27, 1939, (Exhibits K1 and K5) are hereby adjudged to be unlawful under Section 1 of the Sherman Act and the defendants NL and Tinc are hereby enjoined and restrained from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto.

6. The agreements between the defendant DP and Tinc dated July 27, 1937, June 20, 1938, April 21, 1939, May 10, 1940 and June 23, 1941, (Exhibits M, N, Q, R and S) are and each of them is hereby declared to be unlawful under Section 1 of the Sherman Act.

7. The agreements referred to in Paragraph 7 of the findings of fact heretofore filed, including the agreement between NL and Tinc dated March 28, 1939 (Exhibit O), and known as "license field extender agreements," entered into between the defendants NL, Tinc and other corporations found in the findings of fact to be co-conspirators and not within the jurisdiction of this Court, are hereby adjudged to be unlawful under Section 1 of the Sherman Act and the defendants NL and Tinc are hereby enjoined and restrained from the further performance of any of the provisions of said agreements or understandings referred to in said findings.

8. The defendants NL and Tinc are ordered to dispose of their stock holdings and to liquidate any and all financial interests, which either or both of said defendants NL and Tinc may have in any and all of the co-conspirator companies named in the findings of fact heretofore filed by this Court, within a period of six months from the date of this decree, said sale to be subject to the approval of this Court as to the person or corporation to whom said stock or financial interest is sold or transferred; provided, however, that no part of said stock or financial interest may be sold or otherwise transferred or disposed of to any of the defendant corporations, their successors or assigns, or to any other corporation in which
296 said defendants have any financial or stock interest of any kind, nature or description whatsoever.

The defendant NL is ordered to divest itself of any and all financial or stock interest in Tinc and to present to the Court for its approval, a plan for the dissolution of Tinc within one year from the date of this decree. Such plan of dissolution shall provide for the transfer to NL of all patents U. S. and foreign and all patent applications U. S. and foreign owned by or under the control of Tinc, which patents and patent applications shall be subject to the provisions of paragraph 9 of this decree. Such plan of dissolution shall further provide for the use, to the extent possible by the companies formed by NL pursuant to paragraph 9 herein, of such trade-marks and trade-names as are presently used by Tinc or any of its affiliated companies in the sale of titanium pigments or products by Tinc outside of the territorial limits of the United States.

9. The defendants NL and DP are each hereby ordered to take immediate action leading to the ultimate disposition and divestiture by each of said defendants of any

and all interest while each of said defendants may have in the physical plant, property, equipment and other assets owned by or under the control of each of said defendants and used by them in the manufacturing of titanium pigments or compounds, said divestiture and disposition of the physical plant, property, equipment and assets of each of said defendants, used by them in the manufacturing of titanium pigments or compounds shall be completed within one year from the date of this decree, unless extended by order of this Court after application properly made by said defendant or defendants. In accomplishing

297 this divestiture, each of the defendants is ordered to create two separate and distinct corporations to each of which they shall each transfer one of their plants engaged in the manufacturing of titanium pigments and compounds, together with any and all operating equipment and facilities, including technical and research personnel necessary to enable said separate corporation to function as a separate and complete competitive and operating unit in the titanium pigment business. (In the event the defendants NL and DP transfer all of their technical personnel to said corporations, the provisions of paragraph 11 herein shall be binding on the corporations created pursuant to this paragraph, it being the intention of the court, as provided in paragraph 11, to make all technical information referred to therein available to all persons or corporations desiring the same.) The establishment of said separate corporations shall be in accordance with a plan prepared by the defendants in accordance with the requirements of this paragraph and submitted to this Court for its approval within a period of six months from the date of this decree. All of the stock in each of said corporations so created by the defendants in accordance with the provisions of this paragraph, shall be disposed of by the defendant corporations owning the same within a period of one year from the date of this decree. The sale of this stock in said corporations created pursuant to this paragraph, shall be subject to the approval of this Court as to the purchaser thereof; provided, however, that no part of said stock may be sold or otherwise transferred or disposed of to any of the defendant corporations, their successors or assigns, or to any other corporation in which said defendants have any stock or financial interest. In the event the stock interests of the defendant corporations in the corporations created by the defendants pursuant to

this paragraph to accomplish the divestiture herein provided for, is not disposed of within a period of one year from the date of this decree, this Court may, upon the application of the plaintiff, order said shares of stock to be sold at public auction on such terms and conditions as may be prescribed by this Court.

10. Defendants NL, Tine and DP are hereby ordered to make available, for the duration of the patents, on a royalty free basis to any person or corporation desiring the use of the same, any and all U. S. patents or patent applications which relate to the manufacture or use of titanium pigments or compounds, together with any use patents or patent applications owned or controlled by said defendants outside the United States, which patents and patent applications are numbered and described in Exhibit A attached hereto and made a part hereof.

Said defendants are further ordered to grant licenses to such persons or corporations as may request them of all patents which relate to the manufacture or use of titanium pigments or compounds, which are issued to any of the defendants on any patent applications filed with the United States Commissioner of Patents after the date of this decree and on which patents are issued within a period of five years from the date of this decree, or of which the defendants are or become the exclusive licensee, during a period of five years from the date of this decree; said licenses to be granted to such persons or corporations as may request them on a reasonable royalty basis for the life of said patents, the reasonableness of said royalty to be determined by this Court in the event the defendant owner of such patent and the person or corporation requesting a license thereof, are unable to agree upon the royalty to be charged.

11. The defendant DP is enjoined from collecting any royalties from the American Zirconium Corporation, or its successors and assigns, under license agreement dated January 1, 1935, (Exhibit I) entered into between Krebs Pigments and Color Corporation and American Zirconium Corporation, which agreement was assumed by defendant DP, and from Virginia Chemical Corporation, its successors or assigns, under the license agreement between defendant DP and Virginia Chemical Corporation, dated August 5, 1937 (Exhibit L). Defendants NL, Tine and DP are hereby enjoined from bringing, or threatening to bring, any action against any person or corporation for the alleged use or alleged infringement

of any of the patents or patent applications, or any patents hereafter issued to said defendants from any such patent applications, described and numbered in Exhibit A attached hereto and made a part hereof.

12. Defendants Tine, NL and DP are hereby ordered, subject to the provisions of paragraphs 7 and 8 respectively, to make available, without charge, to any and all persons or corporations desiring the same, for use in the manufacture of titanium pigments or compounds, any and all technical information or service relating to the practice or use of any of the patents described in Exhibit A, or to any technical problems relating to the manufacture or use of titanium pigments or compounds for a period of five years from the date of this decree or until further order of this Court, which ever is sooner. If the furnishing of such information or technical knowledge requires the personal service of an employee of any of the defendants away from the place of his employment, such defendant furnishing the services of such employee may make a reasonable charge for such service of the person or corporation requesting the same, provided, however, that any charges for such technical services herein ordered to be made available to any or all persons or corporations desiring the use of the same, shall be fixed by the Court upon complaint of any person or corporation availing or desiring to avail itself of such
300 technical services where such charges are deemed excessive by the person or corporation making use or desiring to make use of the same.

13. Each of the defendants and each of their directors, agents, employees and successors and all persons acting, or claiming to act, under, through or for them or any of them are hereby enjoined and restrained (1) from entering into, adhering to, maintaining or furthering directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves, the corporations found to be co-conspirators herein, or with any other person, which has as its purpose or effect the continuing, reviving or renewing of any of the agreements, contracts or understandings described in the findings of fact or found in this decree to be in violation of the Sherman Antitrust Law; (2) from taking any action that might restrict or tend to restrict the export or sales for export from the United States of titanium pigments or compounds or products containing titanium pigments or compounds; (3) from taking any action or refraining

from taking any action that might restrict or tend to restrict the purchaser of titanium pigments or compounds from any of the defendants in the full and unrestricted use thereof.

14. Defendants are further ordered when provided for in this decree to give proper notice of any of the acts provided by them to be performed herein to the Attorney General of the United States or his proper representative who shall, for the purpose of securing compliance with this decree, be permitted (1) access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any matters contained in this decree, (2) without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters: Provided, however, That information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this decree in which the United States is a party or as otherwise required by law.

15. The motion of the defendant DP for dismissal of the complaint against it made at the close of the plaintiff's case in chief and renewed by the defendant DP at the close of all of the evidence in the case, is hereby overruled. The motion of the defendants NL and Tinc for dismissal of the complaint against said defendants is likewise overruled. Judgment is entered against the defendants for all costs incurred in this proceeding.

Approved:

..... Judge.

.....
Attorneys for Plaintiff

.....
Attorneys for Defendants
National Lead Company and Titan Co. Inc.

.....
Attorneys for Defendant
E. I. du Pont de Nemours & Company

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In United States District Court

[Title omitted.]

STIPULATION AS TO CERTAIN FACTS

It is stipulated by and between the Government and the defendant, E. I. du Pont de Nemours and Company, as follows:

Du Pont sold titanium pigments in Canada during the period 1932-1937. All of its sales were made to CIL with the exception of 120,000 pounds of pigments sold in 1937 to CTP. Du Pont did not make any sales in Canada in 1938 or thereafter. Du Pont sales to CIL were for its own use and not for resale. CIL did not resell any titanium pigments purchased from du Pont. The sales in 1937 to CTP were for resale.

The price to CIL charged by du Pont was based upon the American selling price. Prior to 1937 du Pont gave CIL a discount of $1\frac{1}{4}\%$ per pound carload lots and $1\frac{3}{4}\%$ per pound less than carload lots below the American price and assumed all freight charges for delivery to CIL. In

1937 the American price was charged without dis-
303 count on the only two sales made, both of which were less than carload lots. In all years CIL paid the 15% Canadian duty and the 3% Canadian excise tax. The resulting cost to CIL was 18.99¢ per pound for the years 1934-1936 inclusive, which compares with the British price reflected in Government Exhibit 669 of 18.4¢ per pound, which was approximately the British price.

The sales made by du Pont to CTP in 1937 were made on a discount basis of $7\frac{1}{2}\%$ below the American selling price, du Pont assuming freight. CTP paid Canadian duties and excise tax. The resulting price to CTP was 17.6¢ per pound as compared to the British price reflected in Government Exhibit 669 of 18.4¢ per pound. CTP in turn resold charging the same price which it charged for pigments purchased from National Lead for resale. Du Pont's price to CTP was computed on a different basis and was higher than National Lead's price to CTP.

During the period 1932-1937, the Canadian duty for titanium pigments imported from the United States was

15%, while in the same period British titanium pigments were imported into Canada duty free.

WILLIAM C. DIXON,
Counsel for United States of America,

CRAVATH, SWAINE & MOORE,
*Counsel for E. I. du Pont de Nemours
and Company.*

Dated October 1, 1945.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
against

NATIONAL LEAD COMPANY, TITAN
COMPANY, INC., E. I. DU PONT DE
NEMOURS AND COMPANY,
Defendants.

Civ. 26-258

Appearances:

JOHN F. X. MCGOHEY, Esq.,
United States Attorney, for plaintiff;

HERBERT A. BERMAN, Esq.,

WILLIAM C. DIXON, Esq.,

Special Assistants to the Attorney General,

JULIAN CAPLAN, Esq. and

EPHRAIM JACOBS, Esq.,

Special Attorneys,

Of Counsel.

BETHUEL M. WEBSTER, Esq., and

CLIFTON P. WILLIAMSON, Esq.,

*Attorneys for defendants National Lead Co. and
Titan Company, Inc.;*

BETHUEL M. WEBSTER, Esq.,

CLIFTON P. WILLIAMSON, Esq.,

EDWARD L. REA, Esq. and

CAROLINDA WATERS,

Of Counsel.

CRAVATH, SWAINE & MOORE, Esqs.,

*Attorneys for defendant E. I. du Pont de Nemours
and Company,*

WILLIAM DWIGHT WHITNEY, Esq.,

JOHN LOGAN O'DONNELL, Esq. and

GERHARD A. GESELL, Esq.,

NESTOR SHEA FOLEY, Esq.,

Of Counsel.

RIFKIND, D. J.

By its complaint the United States alleges a cause of action under sections 1 and 2 of the Sherman Act: 26 Stat. 209, 15 U. S. C. A. §§ 1, 2. Its prayer is for an injunction to restrain the alleged violations of the statute and for ancillary remedies to make the court's mandate effective.

The defendants are National Lead Company and E. I. du Pont de Nemours & Company, Inc., the two principal producers of titanium pigments in the United States and the two largest producers thereof in the world; and Titan Company, Inc., wholly owned by NL and in turn the owner of substantial stock interests in the following corporations, producers of, dealers in titanium pigments: BTP, TG, SIT, TAS and TK.

The complaint charges that

"Beginning on or about July 30, 1920, defendant National and co-conspirator Titan A/S, and the remaining defendants and co-conspirators, and others to plaintiff unknown, on various dates thereafter, continuing at all times thereafter to the date of the filing of this complaint [June 24, 1944], have been continuously engaged in a combination by the means and methods hereinafter set forth, in restraint of, and to monopolize, the aforesaid trade and commerce in titanium compounds among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements, and understandings in restraint of such trade and commerce, all in violation of Sections 1 and 2"

of the Sherman Act.

The evidence supports the allegation in every material respect.

Titanium is a very abundant element. The principal ores which yield titanium in commercial concentration are ilmenite and rutile. Titanium compounds and particularly titanium dioxide possess the characteristics of opacity, great hiding power, high tinting strength and chemical inertness. These properties make it superlatively suitable for the manufacture of white paint and valuable in the production of rubber, glass, paper and several additional materials.

The commercial development of titanium compounds is founded largely upon the work of three groups of chemists working independently at and about the time of the first World War. In the United States, at Niagara Falls, New York, Messrs. Barton and Rossi developed a process for the manufacture of titanium compounds. Patents were issued to them; and these they assigned to TP, a corporation formed for the purpose. In Norway, Gustav Jebsen and his associates, interested in the utilization of a large ilmenite deposit, developed another process. The patents which were granted thereon were assigned to TAS, organized for the purpose of exploiting them.

In France, Joseph Blumenfeld invented and procured patents for a third process. Terres Rares acquired these patents.

In 1920 NL held 10% of the stock of TP and had an option to acquire up to 50% of its stock. NL thereupon negotiated an agreement with TAS which was executed and went into effect on July 30, 1920. This agreement became the basic charter for the world-wide regulation of production and commerce in titanium compounds.

It marked the birth of a new industry. In the course of the ensuing twenty years titanium pigments outstripped the production and sale of lithopone and white lead. In the

United States production rapidly mounted and by 1940 more than 100,000 tons of pure TiO_2 , having a value in excess of \$40,000,000 were manufactured and sold. In Europe and other parts of the world, too, the industry took serious hold and production mounted to approximately one third of the United States tonnage. By 1944 American production had risen to 133,000 tons of pure TiO_2 . Most of the sales were not in the form of pure TiO_2 but in the form of extended pigments—that is, pigments composed of TiO_2 chemically united or mechanically mixed with other ingredients.

Throughout this period prices were repeatedly reduced and only once, in 1941, increased.

At or about the time of the outbreak of World War II [this point of time is taken arbitrarily] we find this industry predominantly occupied in the United States by two producers, NL and DP, who supplied, in 1939, 73,645 tons out of a total of 82,940 tons. The balance of 9,295 tons is produced by American Zirconium, a licensee of both NL and DP and by Virginia Chemical, a licensee of DP². We further find a complete absence of imports of titanium products from abroad, and complete absence of exports from the United States, except to the countries of the Western Hemisphere.

In order to understand how this condition of affairs came to be, it is necessary to review the provisions of the mentioned contract of 1920 and briefly to relate the history of the persistence of its principles in more than 60 agreements subsequently executed.

The 1920 agreement between TP and TAS provided:

The preamble recited that each of the parties owned and expected to own certain patents and that each desired to

obtain rights under the patents owned by the other, within the "licensed field".

"Licensed field" was defined to include all substances consisting of or containing above two per cent. of titanium, or a compound or compounds thereof, unless such substances contained by weight more than five per cent. of a metal other than titanium in its purely metallic state, and all apparatus, methods, and processes useful in the obtainment or manufacture or use of said substances.

TP agreed to grant to TAS and TAS accepted a license, exclusive of all others including TP, to manufacture, use, and sell each and every invention improvement, or subject matter in the licensed field, under existing or future letters patent; but only in or for territories outside of North America and South America.

TAS agreed to grant to TP and TP accepted a license, exclusive of all others, including TAS, identical in scope and extent except that it was limited to and for the territories within North America (defined to include Central America and Panama).

Each party granted the other a non-exclusive license to use or sell, under patents issued by South American countries, but only in South America.

The parties agreed to make available to each other copies of patent applications; and detailed provision was made for the prosecution of patent applications and the maintenance of patents within the territory of each party respectively.

Each party agreed never to question the validity of the patents of the other.

TAS appointed TP its sole agent for the introduction into and sale in North America of *all products of TAS in*

the licensed field. Such importation into the United States could take place only upon the order of the agent; and the sales in North America were to be made at prices and upon conditions fixed by the agent.

TP similarly appointed TAS its sole agent for introduction and sale, outside of North and South American of all TP products in the licensed field.

Each party was permitted to import into the territory of the other finished articles, such as point, glass, rubber, in which a titanium product had been used as a raw material—but only when the titanium product did not constitute such an important part of the finished article that its sale would substantially interfere with sales of its own products by the other party within its own territory.

Each party agreed to impart to the other full and accurate technological information relating to the licensed field; and to permit plant inspection (exclusive of research laboratories).

Article XIV of the agreement conferred upon each party the right to grant licenses under its own patents or sublicenses under the other's patents, on condition that every such licensee or sublicensee would

- a) grant to the party to the 1920 agreement, other than its licensor, exclusive licenses under all its patents, present and future, in the licensed field, identical in character, territorial scope, and duration to the rights granted by the 1920 agreement by the parties thereto;
- b) appoint such other party its sole agent on the same terms as obtained between the parties to the 1920 agreement;

- c) would impart to such other party technological information to the same extent as obtained between the parties to the 1920 agreement;
- d) would abide by the territorial allocation of the 1920 agreement.

The agreement of 1920 was to continue in effect until 1936, and was then to be automatically renewed for successive ten year periods, each party having the right to cause a termination by notice given at least five years before the end of such period.

By an agreement executed simultaneously with TP and TAS, NL bound itself to respect the contract of 1920, promptly to assign to TP all its then owned or thereafter acquired patents, inventions and improvements relating to the licensed field, throughout the world, and to communicate to TP all its technical information in the licensed field.

It is manifest that by the terms of this agreement the parties had divided the world into two trade areas or territories; that each party agreed not to trespass into the territory allotted to the other; and that all commerce between the two territories in titanium products was, as far as these parties were concerned, interdicted and could proceed only by the grace of their mutual consent. The suppression of this commerce was not limited to patented articles or to articles produced by patented processes but extended to all products within the "licensed field".

The objects of this arrangement have not been left unstated, to be ascertained by inference and deduction. They are disclosed by a large volume of written correspondence, uninhibited by any respect for, or indeed any apparent awareness of the prohibitions of the anti-trust laws.

These explicitly stated objects are: 1, the elimination of competition; 2, the advancement of the art through the exchange of technology. It was the belief of the architects of this foundation of the industrial structure they hoped to build thereon, that the second object could not be attained except in a climate of cooperation engendered by the achievement of the first object. And it was their intention that the advance in the art, accelerated by the exchange of patents, patent applications and "know how", should as far as possible remain the private prize of the parties, and constitute their shield and weapon against outsiders. 1

This intention was carried into effect.

An examination of the evidence reveals the perpetuation of what the parties called the principles of the 1920 contract by a network of agreements which have confined the international trade in titanium products within the pre-ordained channels where-through it moves only by the grace and under the regulation of NL and its foreign associates. It is unnecessary to rehearse the history and detail of that development. Both are recited in the Findings of Fact. A very brief summarization is all that will be attempted here.

In 1927 NL acquired 87% of the stock of TAS. Jeb-sen retained 13%.

In 1929 NL organized Tinc, which thereupon acquired the rights and assumed the liabilities of TAS under the 1920 Contract. Tinc became NL's corporate pocket for the deposit of its holdings in foreign titanium enterprises. By 1932 NL had acquired all of the stock of TP and in 1936 it acquired all its assets and assumed its obligations.

On May 1, 1925, by agreement between TAS and French interests, SIT, a French corporation, was estab-

lished to manufacture and distribute titanium products but only within the territory of France and its colonies (except those appurtenant to North and South America). Both TAS and NL acquired substantial interests in SIT. On March 3, 1927, the arrangements between TAS and SIT were confirmed and elaborated to give explicit expression to the provisions of the 1920 Contract relating to territory, competition and technological collaboration.

In 1927, by agreement between TAS (acting also in behalf of and in the interest of NL) and IG, a German corporation was established, called TG. IG and TAS became the joint owners of TG. IG agreed that it would not engage in the titanium business except through TG, to whom it assigned all its titanium patents and to whom it agreed to assign all its future titanium patents. To TG was assigned a territory consisting of Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Roumania, Serbia, Croatia, Slovenia, Bulgaria, Greece, Turkey, Japan, China, and Spain. TAS and TG simultaneously entered into an agreement which embodied the principles of the 1920 Contract.

NL was in good part motivated in bringing about these German agreements by the desire to be free of the potentially very dangerous competition of so powerful a producer as IG. The evidence is incapable of any other inference.

By 1933 NL was acting in the foreign field through Tinc. By a series of agreements entered into in February and March, 1933, production and distribution of titanium products within the British Empire (exclusive of North and South America) were brought within the orbit and subjected to the regulation of the principles of the 1920 Con-

tract. The agreements were among Tinc, ICI, ISC and GW. Pursuant to these agreements BTP was formed and became the assignee and licensee of existing and future titanium patents of the parties to the agreement; it also became subject to and beneficiary of the principles of exclusive territorial allocation and patent and technological collaboration of the 1920 Contract.

Meanwhile, significant events were taking place within the sphere of relations between the producers already mentioned and other producers, both American and foreign, whose processes stemmed from the inventions of Joseph Blumenfeld. But I shall depart from the chronological order in order to complete the recitation of events pertinent to the producers whose processes were rooted in the Jebesen-Barton and Rossi inventions.

Canada was NL's territory under the 1920 Contract. But danger of independent competition in that market developed from the plans of Laporte. In 1937, NL and CIL entered into agreements for the formation of CTP, to whom Canada was assigned as its exclusive territory. CTP became the beneficiary of all present and future titanium patents of both its founders. It was subjected to the restrictions and given the benefits of the principles of the 1920 Contract. The threat of Laporte's competition was eliminated by an agreement under which Laporte's Canadian business and patents were purchased and Laporte covenanted to stay out of the titanium business in Canada for 15 years.

In 1936, Tinc, IG and TG, a Blumenfeld company, TR and a Japanese company, KK, joined in the formation of TK to engage in the manufacture and sale of titanium products. The territory assigned to TK was the Japanese

Empire. This agreement departed in some respects from the principles of the 1920 Contract but it adhered strictly to the principles of exclusive territorial allocation and the elimination of competition between territories. In the new Japanese company ownership was divided as follows: 50% to KK; of the remaining 50%, TR got 30% and Tinc and IG 70%. This division of interest between Tinc and IG on one side and the Blumenfeld companies on the other was dictated by agreements previously entered into which need now to be briefly mentioned.

It has already been stated that Joseph Blumenfeld had assigned his titanium patents to TR. TR in turn assigned or licensed them to Aussig of Czechoslovakia, Montecatini of Italy, Thann of France, Laporte of Great Britain and Commercial Pigments of the United States, who severally were engaged in the production of titanium products and exploited various markets in competition with the producers, already mentioned, who utilized the Barton-Rossi and Jebson processes. Beginning in 1933, a series of agreements were negotiated and executed, the object of which was to bring this competitor under the control of the parties.

i. The first of these was the Aussig agreement, made in 1933, by TG and Aussig. This agreement regulated production, territory of sale, sales quotas, prices and patent exchange.

ii. The Contrat a Quatre was executed in 1935 to take effect as of May 1, 1934. The parties were Thann and TR on one hand, and SIT and Tinc on the other. It regulated sales quotas, prices and patent exchange.

iii. The Contrat de Livraisons was executed in 1935 by the same parties. To prevent the expansion of

producing capacity, the contract provided that each would supply the other with its surplus product to satisfy the other's deficiency.

iv. The Contrat a Six was executed at the same time. The parties were Thann, TR, Montecatini, Tinc, SIT, and TG. It regulated sales-territories and sales-quotas of each of the parties. All the parties agreed to give neither technical nor commercial assistance or assign any patent or grant any license to any outsider who intruded into the territories covered by the agreement. This agreement was renounced by Montecatini on December 31, 1938.

v. The British Empire was not embraced within the forementioned agreements. Sometime in 1936, BTP and Laporte entered into agreements whereby Laporte withdrew from the world market outside the British Empire and uniform prices were established in the British market. In 1941, BTP and Laporte entered into a quota arrangement with Laporte, establishing 80% as BTP's share and 20% as Laporte's share of the British market.

I return now to the United States and take up the thread of the story in 1931. Since this aspect of the case will require more detailed analysis, I shall but sketch its outlines to serve as a frame of reference for the discussion which is to follow. As already indicated, Commercial Pigments held the American rights under the Blumenfeld patents. Until 1931, the company engaged in manufacturing and selling pure TiO_2 . In 1931, these rights were acquired by Krebs, a corporation organized by DP and Commercial Solvents Corporation. DP acquired 70% of the stock of Krebs.

Krebs manufactured and sold titanium compounds until 1935, when DP acquired all its assets. Thereafter and to date, DP engaged directly in manufacture of titanium compounds. After a protracted period of negotiation between NL and DP, their respective titanium subsidiaries TP and Krebs, entered into a written agreement, dated January 1, 1933, which was executed in July of 1933. By the terms of this agreement they

i. exchanged irrevocable, non exclusive licenses, within the United States, to use all processes, methods, and apparatus relating to or in the "licensed field", whether or not patented or subject to patent, then or thereafter owned by them or otherwise at their disposal, with the right to sell products resulting from the exercise of such licenses in the United States, its colonies and possessions, Mexico, Central America, the West Indies and South America;

ii. agreed to exchange technical information and experience;

iii. agreed to assist each other to acquire an irrevocable, non-exclusive license, for the territory above described, under any patent or application owned by or otherwise at the disposal of third parties, under which one of them was itself licensed; and Krebs agreed that it would offer to any foreign associate of TP, before offering to any other person, the opportunity to acquire, upon mutually satisfactory terms, an irrevocable, non-exclusive license under any patent, then or thereafter owned or at the disposal of Krebs, relating to the "licensed field", issued in any country of Europe or in Great Britain;

- iv. released each other from infringement claims;
- v. agreed that the agreement might be terminated after December 31, 1933, on three years notice.

Before this agreement was executed there was an exchange of oral and written communications between NL and DP, of which more will be said hereafter. It is sufficient to indicate at this point that the DP agreement departed in several important respects from the requirements of Art. XIV of the 1920 Contract.

In each of the years 1937 to 1941, inclusive, DP and Tinc entered into agreements whereby DP granted to Tinc licenses, exclusive except as to DP, under specified titanium patents and applications of DP, in specified countries, with the right to grant sublicenses to TG, BTP, SIT and from 1939, to TK; and Tinc, with the consent of NL, granted DP non-exclusive licenses under specified United States patents and applications.

On or about May 1, 1940, the exchange of technical information between NL and DP was discontinued; and by agreement of January 1, 1941, the 1933 agreement was amended accordingly.

As already noted, there are in the United States only two other producers of titanium products, American Zirconium and Virginia Chemical.

American Zirconium began the manufacture of titanium compounds in 1934. NL and DP severally notified American Zirconium that it was probably infringing. On May 6, 1935, NL (through TP) entered into an agreement with American Zirconium for the cross-licensing of patents. The agreement in all material respects embodied the principles of the 1920 Contract. In lieu of royalties NL received 10% of the stock of American Zirconium.

In April, 1944, the agreement was cancelled and NL assigned its American Zirconium stock to the latter's parent corporation.

In July, 1935, DP and American Zirconium entered into an agreement dated January 1, 1935, whereby DP granted American Zirconium a non-exclusive license under specified patents, subject to a royalty on the "total quantity of titanium dioxide produced" and subject to a quantity limitation on the tonnage of "titanium dioxide made wholly or partly under the license". The quantity limitation was graduated from 3,000 tons at the inception of the contract to 9,000 tons in 1944 and thereafter. The limitation was from time to time somewhat relaxed and was cancelled on November 10, 1944, on recommendation of DP's Legal Department.

Virginia Chemical received a license from DP on August 5, 1937. Its terms were substantially similar to those of the American Zirconium license. The quantity limitations were eliminated at the same time and under the same circumstances as the corresponding change was made in the license to American Zirconium.

This concludes the barest outline of the history of the titanium industry. In detail, the elapsed quarter century is crowded with negotiations, conferences, correspondence and agreements. The men who participated in these were all articulate, literate and, with the exception of DP's Rupprecht, recorded what they saw, heard, said and thought with Boswellian fidelity. When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce have not been formed by the winds and currents of competition.

They are, in large measure, artificial canals privately constructed. The borders of the private domain in titanium are guarded by hundreds of patents, procured without opposition, and maintained without litigation. The accumulated power of this private empire, at the outbreak of World War II, was tremendous. It was more difficult for the independent outside to enter this business than for the camel to make its proverbial passage through the eye of a needle.

For the purpose of the discussion which follows, it is convenient to segregate DP's relations with NL and the foreign producers from NL's relations with the foreign producers.

I. The case against NL and Tinc.

At the outbreak of World War II we find that NL and Tinc are, by virtue of agreement, members of a world-wide combination. The more intimate members of that combination are NL, Tinc, TAS, SIT, TG, BTF, TK and CTP. Among these, the closest cooperation prevails. Territories are allocated; patents and patent applications are interchanged and cross licensed; technological information or "know-how" of one is promptly made available to the others (except TK). Each operates in its own exclusive territory. When there is suspicion that a customer of one is shipping into the territory of another, investigation is promptly made with a view to suppressing the "illicit" traffic. Competition among them is non-existent.

A less intimate bond unites the members of this Titan family with the Blumenfeld group. No member of the latter group exports into NL's exclusive territory. NL does not export outside of the Western Hemisphere. For

the territory beyond NL's frontiers, quota arrangements and price agreements assure the absence of competition between the Titan family and the Blumenfeld group. In Japan both groups unite in a common enterprise.

And all this is the product of agreements.

Clearly this combination affects the interstate and foreign commerce of the United States. No titanium pigments enter the United States except with the consent of NL. No foreign titanium pigments move in interstate commerce except with like approval. No titanium pigment produced by NL may leave the ports of the United States for points outside the Western Hemisphere.

One of the objects of the combination is to suppress competition.

On January 12, 1927, the president of NL writes to Evans McCarty, its vice-president, and one of the chief architects of the combination:

"The titanium patents expire in 1936 unless extended in ways not at present known to us. . . . Therefore, with us in the United States and with the Norwegian Company, there is a common need to exploit titanium pigments and, at the same time, protect ourselves; so that after the expiration of patent rights, we may have the manufacture and sale thereof under our control so as to continue to reap the harvest from the seed we are now sowing. If you, therefore, could formulate a plan satisfactory to Dr. Jebesen, whereby we could arrange to pay a royalty to the Norwegian Company similar to that he proposed to ask from the German Company, under an agreement that the National Lead Company would endeavor to organize companies in Germany, England and such other European countries as it

desired—in each of which companies the National Lead Company should acquire and own at least one-half of the capital stock outstanding—I would personally look with favor upon such an arrangement” (Pl. Ex. 70).

On April 27, 1932, Jebesen writes to Major Barley, of Imperial Chemical Industries, Ltd., proposing the formation of a British company in keeping with the suggestion of NL's president. Therein he refers to the 1920 Contract and adds:

“In order to avoid competition and friction, it was agreed that each company should confine its activity of manufacture and sales to a definite territory”. (Pl. Ex. 112).

Prior thereto, on September 16, 1930, Jebesen reported to McCarty concerning the early conversations with Aussig:

“I presented for discussion your suggestion of a pooling of the patents. It is not quite clear to me what is meant by this. We thought, however, that the idea was mutual cooperation and possible joint action to keep third parties out”, (Pl. Ex. 522).

He pointed out a number of obstacles in the path of such a scheme—but these were in fact overcome.

In April, 1931, Cornish, president of NL, finds himself obliged to contribute to the correspondence by reason of McCarty's illness. The subject under discussion is apparently the proposed arrangement with the Blumenfeld companies:

“May I call the proposed combination, for simplicity, a cartel?”

And he defines it.

"The whole purpose of the cartel is to obtain a monopoly of patents so that no one can manufacture it excepting the members of the cartel, and so can raise the prices by reason of such monopoly to a point that would give us much more profit on our present tonnage, but also prevent a growth in tonnage that would interfere with their greater profits in lithopone". (Pl. Ex. 183).

He voices objections based on business, not legal, grounds. His objections, however, were apparently not pressed.

Such was the purpose for which, and such were the means by which, NL, McCarty and Jebsen built their closed system. To have access to the patents of the combination, the stranger must not only have the consent of the member of the combination in whose "territory" he would operate, but he must adhere to the principles of the combination. The cornerstone of the system was the private regulation of international trade. The suppression of competition was the cement which held the superstructure in place.

Whether the form of association they created be called a cartel,⁵ an international cartel, a patent pool, or "a technical and commercial cooperation", is of little significance. It is a combination and conspiracy in restraint of trade; and the restraint is unreasonable. As such it is outlawed by Section 1 of the Sherman Act; and it is unimportant whether it also violates Section 2.

No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members

of the combination, offends the Sherman Act. Hence we need only consider the adequacy of the defenses asserted against the case established by the plaintiff.

The system of territorial allocation and suppression of trans-Atlantic traffic in titanium compounds and pigments cannot be justified as ancillary to the grant of a license under a patent. True, the network of agreements did involve cross-licensing of patents—but it was not limited thereto. The agreements applied to patents not yet issued and to inventions not yet imagined. They applied to commerce beyond the scope of any patents. They extended to a time beyond the duration of any then-existing patent,

Ethyl Gasoline Corp. v. U. S., 1940, 309 U. S. 436, 456.

They embraced acknowledgement of patent validity with respect to patents not yet issued, nor applied for, and concerning inventions not yet conceived,

Pope Mfg. Co. v. Gormully, 1892, 144 U. S. 224;

U. S. v. Hartford-Empire Co., N. D. Ohio, 1942, 46 Fed. Supp. 341, 615.

They extended to countries, such as China, where no system of patent monopolies exists;

Interstate Circuit, Inc. v. U. S., 1939, 306 U. S. 208.

They regulated the disposition of the products after sale by the licensees,

U. S. v. Uniris Lens Co., 1942, 316 U. S. 241;

U. S. v. Bausch and Lomb Optical Co., 1944, 321 U. S. 707.

While it has been held that the owner of a patent may license whom he will or refuse to license,

Continental Paper Bag Co. v. Eastern Paper Bag Co., 1908, 210 U. S. 405,

it is now well settled that a license may not be used to extend the patent monopoly beyond its terms,

Morton Salt Co. v. Suppiger Co., 1942, 314 U. S. 488;

Ethyl Gasoline Corp. v. U. S., supra, 456.

And where there is a refusal to license (or refusal to license except on specified conditions which would extend the patent monopoly) which is the product of agreement or conspiracy, on part of the owners of competing patents, I believe, the law is offended to the same extent as the law is violated when several combine and agree not to do business with a particular customer or class of customers.

U. S. v. Colgate & Co., 1919, 250 U. S. 300;

U. S. v. A. Schrader's Sons, Inc., 1920, 252 U. S. 85;

U. S. v. Waltham Watch Co., S. D. N. Y. 1942, 47 Fed. Supp. 524, 531.

The agreements here involved offend in that respect, as well.

It is suggested that the 1920 Contract may escape the condemnation of the Sherman Act by recourse to the doctrine which validates covenants in restraint of trade when reasonably ancillary to a lawful principal purpose, such as the sale of a business;

U. S. v. Addyston Pipe and Steel Co., C. C. A. 6, 1898, 85 Fed. 271, affd. 175 U. S. 211.

Such a principal purpose is, in the case at bar, supposed to be the sale by TAS of its American business to TP, accompanied by a license under its patents; and conversely, the sale by TP of its foreign business to TAS, accompanied by a license under its patents.

The shortest answer to this suggestion is that, in fact, TAS had no American business to sell, and that TP had no foreign business to dispose of. At best, each had an opportunity and a hope. Certainly the world wide territorial allocation was unreasonable in scope when measured against the business actualities. This is a case where if not the sole, at least one of the principal objects was "to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster";

U. S. v. Addyston Pipe and Steel Co., 1898,
85 Fed. 271, 282;

Greater New York Live Poultry Co. of C. v.
U. S., C. C. A. 2, 1931, 47 Fed. 2d 156, cert.
den. 283 U. S. 837.

In each of the subsequent agreements which resulted in the creation of SIT, TG, BTP, CTP and TK, the same purpose, to restrain trade in order to avoid competition, was paramount.

It is suggested that this Court is without jurisdiction to consider conduct abroad, on part of foreign corporations, relating to the commerce of foreign nations. Unquestionably, if the gravamen of the complaint were to impeach the Aussig agreement as such, or the BTP-Laporte quota arrangement as such, the point would be well taken. But that is not the gist of the complaint. On the contrary, it has been alleged and proved that a conspiracy was entered into, in the United States, to restrain and control the com-

merce of the world, including the foreign commerce of the United States. The several agreements relating to manufacture and trade within the European markets are but some of the links in the chain which was designed to enthrall the entire commerce in titanism. The object of the government's attack is a conspiracy in the United States affecting American commerce, by acts done in the United States as well as abroad. It follows that the Sisal case⁸ rather than the Banana⁷ case is the pertinent analogue.

The argument has been advanced that this court cannot invalidate contracts with parties who are not within the court's jurisdiction and amenable to its order.⁹

The absence of NL's foreign associates will, of course, place a practical limitation upon the scope of the court's decree; it does not prevent the court from finding a violation as the facts warrant, and from restraining those within the reach of its mandate from continuing a conspiracy in defiance of the Sherman Act.

It is suggested that plaintiff has failed to establish injury to the public interest,

Appalachian Coals, Inc. v. U. S., 1933, 286
U. S. 344;

and that the defendants have proved substantial public benefit.⁹ The latter proposition, defendants derive from two lines of evidence. The first is that during the regime of the combination, the art has rapidly advanced, production has increased enormously and prices have sharply declined. The evidence does show as much; but it does not follow that the public interest has not been abused. Indeed, the major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury; or at any rate, that such suppression is a greater

price than we want, to pay, for the benefits it sometimes secures. Nor does it necessarily follow that the advance of the art, the rise in production and the decline of prices are attributable to the effects of the combination. *Post hoc, propter hoc*, is an invalid argument whether used by the plaintiff or the defendant. Anyone is free to speculate whether, in the absence of the arrangement, the stimulus of competition might not have produced far greater strides in these beneficial directions. The economic theory underlying the Sherman Act is that, in the long run, competition is a more effective prod to production and a more trustworthy regulator of prices than even an enlightened combination.

The second line of evidence is, that American producers cannot do business successfully in a cartelized world except on cartel terms; and that, to abstain from such business, would amount to a greater restraint on trade than is involved in joining the cartel; see.

Cartels: What We Do About Them?

Milo Perkins, Harper's Magazine, November, 1944.

The validity of this argument has been the subject of congressional inquiry: Temporary National Economic Committee, 76th Congress, Monograph No. 40; Economic and Political Aspects of International Cartels, Committee on Military Affairs, U. S. Senate, 78th Congress, 2d Session. That kind of inquiry, rather than a judicial one, is appropriate to the evaluation of the merits of the proposition. For the courts it is conclusive that Congress has not yet validated such a solution to the problem. Until it does, private agreement and combination and private regulation may not substitute for legislation. Only Congress, not the courts, may grant the required immunity.

It is suggested that the truly vital issues of this case have become moot by the intervention of war with Germany, Japan and Italy; and that the complaint should be dismissed. Reliance is placed upon *U. S. v. Hamburg-Amerikanische Packetfahrt A.G.*, 1916, 239 U. S. 466. Several reasons dictate the rejection of this argument.

(1) The Hamburg case rests upon its own peculiar facts. The offending contract had come to an end by its own terms; as far as the Germans were concerned, it had also terminated by reason of war; and as far as the others were concerned, by the withdrawal of the Germans;

U. S. v. Aluminum Company of America,
C.C.A., 2, March 12, 1945, slip opinion, p.
1256.

"Besides, the contract was of such a kind that the exclusion of the German lines probably made impossible the realization of its purposes in any part;" *ibid.*

In the instant case, the contracts with the Germans had not expired by their terms; and, at least to the moment of America's entry into the war, the parties did not intend or expect that war should or would involve a permanent divorce.

(2) This case abounds with evidence that the parties foresaw the possibility of interruption *causa belli* and made provision for dealing with the interlude and for resumption thereafter. At least this can be said with complete assurance that until the entry of the United States into the war, the contracting parties regarded the war as a tempo-

rary interruption, for which they would, after cessation of hostilities, make adjustments in a spirit of fairness and amity.

Peculiarly revelatory in this connection is plaintiff's Exhibit 512. It is the draft of a letter preserved in the files of Finc, entitled, "Draft of letter from Titan Co., Inc. to be sent later, presumably after the war, to: I. G. Farbenindustrie, Titangesellschaft, British Titan Products Company and Ste. Inc. du Titane." The letter reports the amendment of January 1, 1941, to the NL-DP agreement of 1933, explains that war conditions rendered consultation with the addressees impractical and expresses a desire for their approval. When this was written, the United States was not at war; but England, France, Germany, and Italy were at war. One can not read Exhibit 512 without sensing the expectation, indeed the assumption, that the war may have interrupted the execution of the several agreements among the parties, it had not permanently disarranged the relations of the parties, and that the return of peace would bring a resumption of the established "co-operation". Much other evidence points in the same direction; and none of the evidentiary material created *ante litem motam* points in a conflicting direction. Upon the trial in the midst of war, the future resumption of relations with the Germans was emphatically repudiated.

The inference I draw is that there is a preponderant probability that the underlying combination or conspiracy persists and that, but for these proceedings, would resume the exercise of its restraining force on commerce to the extent that international conditions permitted.

(3) That some of the contracts have been terminated by war, it seems to me, is of relatively little significance.

For in a legal sense, we mean no more thereby than that the contracts have become unenforceable. But these contracts, being in restraint of trade and violative of the anti-trust laws, were never enforceable. If the non-enforceability of the contract were to render an action under the anti-trust laws moot, we would face the absurd result that only innocent combinations would remain available for judicial scrutiny.

It is suggested that the validity of the British and Canadian contracts has become moot by the application of the doctrine that cancellation or abandonment of provisions of a contract prior to final decree renders the question of the validity of such provisions moot.

Standard Oil Co. v. U. S., 1931, 283 U. S. 163;
U. S. v. U. S. Steel Corporation, 1920, 251
 U. S. 417, 445.

It should be noted that the authorities do not justify the statement of the rule in quite such broad terms.

U. S. v. Trans-Missouri Freight Assn., 1897,
 166 U. S. 290;
U. S. v. Sugar Institute, Inc., S. D. N. Y. 1934,
 15 Fed. Supp. 817, mod. 297 U. S. 553.

Injunctions, of course, relate to future conduct. The formal cancellation of a contract, or of a provision of a contract is a fact to be considered in determining whether, under all the circumstances, the unlawful action of the past is likely to recur in the future; the issue is the likelihood of continuance;

Swift & Co. v. U. S., 1905, 196 U. S. 375, 396.

The facts in the instant case with respect to the British and Canadian contracts are briefly these. At a pretrial conference held in this case on October 30, 1944, counsel for NL called attention to the existence of a new form of contract, then in a state of negotiation between NL and the British companies. At the trial, a copy of such a proposed agreement, not yet executed by the parties, was received in evidence. The named parties were ICI, ISC-GW, Tinc, BTP and NL. Similarly, there was testimony that negotiations were in progress among NL, CIL and CFP to revise the Canadian agreements.

This evidence shows that there is a disposition on part of defendants NL and Tinc to abandon illegal practices; it does not rise to the dignity of proof of abandonment. Nor is it necessary to recite here the precise changes which the parties are willing to introduce into their relations. To my mind these proposed agreements amount to little more than a statement of what defendants are willing to accept. Apparently, execution of the new agreements is awaiting some word of approval by the court. It seems, under the circumstances, that it would be more appropriate to examine them in connection with the framing of a decree, rather than as bearing on the question whether any decree is to be made for injunctive relief.

This branch of the case may be briefly summarized thus:

Agreements creating a world-wide patent pool of all present and future patents of the parties, covering an entire industry, and embracing a division of the world into exclusive territories within which each of the parties is to confine its business activities, with respect to patent protected commodities, as well as unpatented, for the purpose

and with the effect of suppressing imports into and exports from the United States, are unlawful under the Sherman Act; they constitute an unreasonable restraint of trade.

II. DP's part in the international cartel.

As to DP, the facts are by no means as clear. Stoutly it denies any complicity in the combination; and much of the evidence supports its denial. It did not subscribe to the 1920 agreement; the agreement it did sign, in 1933, deviated sharply from the form and from the principles of the 1920 agreement. In 1940, it withdrew from the exchange of technological information with NL. It competed with NL for the American market. It was never regarded by the Titan group as a full fledged member of their family. Its anomalous position was the subject of frequent discussion and apprehension among the Titan members, and efforts were made to convert DP into a fully conforming member.

In sharp contrast with NL DP exhibited, from the very beginning of its interest in titanium, an alert consciousness of the anti-trust laws and moved cautiously and under the guidance of trained anti-trust lawyers. The question is whether it succeeded in avoiding not only the form but also the substance of transgression. I have concluded that it has not; and I arrive at that conclusion by the following analysis of the facts:

DP was manifestly eager to obtain access to NL's patents and skill in the titanium field. NL was equally eager to grant such access. NL's motives for this eagerness are not too important. It matters little whether it sought the reciprocal advantage of DP patents and re-

search; or whether it feared DP's hostile competition more than it feared its friendly, though competitive, collaboration; or whether it anticipated that NL and DP together would constitute an alliance so formidable as to preclude any other important competition. Whatever its motive, NL was willing; but its liberty of action was sharply circumscribed by the agreement of 1920. That required that, before NL could license DP under its patents, DP must adhere to the principles of the 1920 agreement. Such adherence, DP, refused. The reasons assigned by DP for its refusal were several, and varied from time to time, but always conspicuous among them was the claim that its adherence was forbidden by the anti-trust laws.¹⁰ In this troubled atmosphere, the 1933 agreement was drawn, after long negotiation, by lawyers who were aware of the then recent decision in the Gasoline Cracking case. *Standard Oil Co. v. U. S.*, 1931, 283 U. S. 163.

Carefully, they cast the agreement into the form of a settlement of patent disputes. The disturbing fact about that instrument is that despite the high professional skill expended upon it, its terms are, in important respects, so vague that upon the trial, counsel for NL and counsel for DP did not agree upon its meaning. It is clear, and I believe not disputed, that the 1933 writing is far from the lawyer's ideal of clarity and precision. The only explanation which the record affords for this unexpected obscurity is contained in a letter from Mr. Beschorman to NL's English associates, that the vagueness in the writing is deliberate and the product of fear of the anti-trust laws.

That, of course, does not affirmatively show that the law was violated; moreover, it is true that no evidence is available that DP knew of Beschorman's letter. Conse-

quently, I draw no inference therefrom against DP; but I do draw an inference as to NL's frame of mind in its negotiations with DP.

To return to the negotiation: NL was not at liberty to enter into the 1933 agreement unless and until its foreign associates consented. TG objected. It was particularly concerned lest, as a result of this agreement, TG should find itself in competition, in its own "territory", with DP, the latter armed with TG's own skill, acquired by DP, via NL—a state of affairs which TG regarded as intolerable. To overcome the obstacle of TG's objection, conversations were had between Rupprecht, on behalf of DP, with Beschorman, on behalf of NL, and also between Rupprecht and Jebson; and as a result of these conversations two letters were written, one by DP to NL with the intention that it be transmitted to TG; and the other by NL to TG to accompany DP's letter.

If DP is bound by the second letter, it unquestionably joined the conspiracy then in effect between NL and its foreign associates. The text of the two letters is set out in the margin.¹¹

I believe that DP is bound by the second letter because (1) DP asked NL to persuade TG to consent. Rupprecht told Beschorman,

"that it was a selling job for them [NL] to make I.G. realize that they were putting their interests in National Lead's hands, and that they would be well taken care of"; (Pl. Ex. 268).

(2) Rupprecht was shown the Beschorman letter before it was mailed; and a copy thereof was later sent to him "for your files".¹² There was no repudiation by Rupprecht; or at least, the record shows none; and at this point the

burden of going forward with proof of such repudiation shifted to DP;

Interstate Circuit, Inc. v. U. S., 1939, 306 U. S. 208; 225.

Such quiescence on the part of DP can only be construed as ratification. It follows that the assurance that "Du Pont will loyally respect the territory of T.G." which TG discovered in the communications from Rupprecht and Beschorman was an assurance which must be attributed to DP, despite the painstaking efforts on its part to sever the line of imputation. At least then as to territorial delimitations of the titanium pigment business, DP joined the combination.¹³

U. S. v. Masonite Corp., 1942, 316 U. S. 265.

It may well be, and I take it as a fact, that in giving the assurance not to manufacture in or sell in TG's territory, DP was not making a promise; it was doing no more than giving expression to its then existing business policy not to manufacture or sell in Germany and other TG territory; and it may well be that in any event, DP could not successfully compete in Germany. While much has been made of this point, it does not cover the whole issue either factually or legally. Factually it is inadequate, because TG's exclusive territory extended very considerably beyond Germany and included territories where DP might have competed. Legally it is insufficient, because concerted abstinence from commerce is proscribed even where there are valid unilateral reasons for abstaining,¹⁴ and also because DP's assurance, in part, formed the consideration

for the continued abstinence of the European producers from exporting to the United States.

It is idle to speculate as to what might have happened had NL and DP insisted on making their agreement without regard to TG's objections. Presumably, had such an event occurred, TG would have been relieved of its promise not to export to the United States. In a very important way, DP's assurance closed the breach which was in the making in the wall built around the titanium business by NL and its foreign associates. It also removed the last obstacle to the establishment of a commercial collaboration between the Titan group and the Blumenfeld companies. True, Rupprecht did not go as far with Blumenfeld as he did with NL. Not as much was necessary. Indeed, no action on his part was necessary since he sought nothing from Blumenfeld. From the somewhat conflicting testimony as to the nature of Rupprecht's conversations with Blumenfeld, I conclude that Rupprecht made no promise; but that he did explain to Blumenfeld DP's policy with respect to the European market, a policy made unilaterally in many respects, but undoubtedly strengthened and territorially extended as a result of the assurances to NL.

This description of DP's position in 1933 is consistent with subsequent developments. To Jebesen, devotee of the precise covenant, advocate and practitioner of clarity and definition in language and obligation, such vague and Janus-faced language was a source of disquiet and apprehension. But he hoped for the best. He regarded Rupprecht as one who rarely descended from "sound to things". But he appraised DP as an organization that would not repudiate an unwritten obligation. Rupprecht, on the other hand, found the business of practicing one code, and writing another,

rather strenuous and emotionally confusing. No wonder that communication between DP and NL became somewhat difficult; and, at times, NL's and Tinc's representatives left a conference with very different impressions of what had been agreed to from those entertained by Mr. Rupprecht.

The point is made in behalf of DP that there is no evidence that its Executive Committee knew of Rupprecht's commitments. It is true that no direct evidence of such knowledge is in the record; and I need not trouble to decide whether the circumstances warrant an inference of knowledge. There is abundant evidence that Rupprecht's authority was broad enough to justify charging the corporation with his acts in its behalf.

My general summary of the evidence on this issue is that DP was a member of the combination—true, a special member, with a status, rights and obligations, different from that of the other members, but a member nonetheless.

At this point, DP advances the argument that it had no choice but to do business with the cartel unless it was content to stay out of the titanium field. To put it in the words of DP's counsel,

"We respectfully submit in conclusion that it cannot be the law of the United States that it is the function of the Courts themselves to impose that form of restraint of competition which must result from a ruling that whenever a European company has a monopoly in its own country (and practically all of them do), and then has a relation in the nature of a common enterprise with some American company, it becomes the duty of all other American companies to renounce and forego access to the inventions and developments controlled by those foreign companies, and to leave them as the exclusive

property of its American competitor; the partner of those foreign companies".

Perhaps, the answer is that DP, having discovered the conspiracy, should have asked the Attorney General to break it up. Confessedly, the chances of DP getting NL's patents and know-how after such a hostile act would be, to say the least, dubious. But in any event the courts may not validate unlawful conduct because in a particular instance there may be social losses involved in enforcing the law. The paradox which DP discovers, even if it were a genuine one, would be of interest to Congress, not to the courts. But the paradox is not genuine. The conflict is a specious one. Judicial intervention to break up a combination in restraint of trade is not in itself a restraint of trade, although for a time the established channels of commerce may be disarranged. To prohibit adherence to conspiratorial trade restraints hampers trade in about the same way that the prohibition against the circulation of counterfeit money hampers it. It may prevent the consummation of a particular transaction but in the long run it frees business from private regimentation and secures it against those who would trammel it.

III. DP's relations to American Producers.

The case also presents the question whether the contract between NL and DP is offensive to the anti-trust laws independently of the relation of that contract and the parties thereto to the foreign producers.

Here are two competing producers who, at the time their agreement is made, between them control 100% of the commerce in titanium products in the United States.

They agree not only to settle their conflicting patent claims—which presumably they may do under the Gasoline Cracking case—but they agree to exchange all future patents, patent applications and know-how. Though these exchanges are not on an exclusive basis, is it not clear, however, that the capacity of such a combination to dominate the market is vastly increased, that the capacity for the exclusion of outsiders from the industry is multiplied? In other words, was not Mr. Ewing, DP's London manager, (whose disavowal of authority to make the following statement I accept) saying no more than the obvious when he wrote in 1933, concerning the NL-DP agreement:

"We look upon this patent pool as a definite advance in cooperation and the strengthening of both parties' position to the exclusion of outsiders"?

I think so.

When the effect of an arrangement is obvious it is fair inference that the parties intended that effect. The accumulation of great power to restrain trade may in itself be an evil;

U. S. v. American Tobacco Co., 1911, 221 U. S. 106, 175.

When the power thus acquired is exerted to accomplish unreasonable restraints of trade, it is surely an evil. A pertinent question is, therefore, how did NL and DP exercise the great power they acquired.¹⁵

NL licensed one American producer, American Zirconium, and on conditions which required submission to the illegal 1920 contract. It never did license Virginia Chemical; and the evidence is rather persuasive that it did not achieve agreement on royalties and could not get from Virginia Chemical written adherence to the 1920 agreement

and that Virginia Chemical was not sufficiently well known to the Europeans to warrant acceptance of its oral assurance.

DP licensed both American Zirconium and Virginia Chemical. In both instances the licenses were subject to a severe tonnage limitation on the product made under the license and to a royalty on all titanium dioxide produced, whether under the licensed patents or not. DP makes much of the fact that the evidence shows that it never refused a license. It is also true, however, that until 1944, DP did refuse licenses unencumbered by tonnage limitations.

Another inevitable consequence of the NL-DP agreement has been the proliferation of patents. The chief spur to private resistance to the grant of patent monopolies has been withdrawn from the parties who, ordinarily, would be chiefly concerned. It is not without significance that, despite the jaundiced eye with which the courts have been examining and rejecting patents in recent years, not a single one of the hundreds of patents here involved has ever been litigated. The result of that is that the newcomer is confronted by a veritable jungle of patent claims through which only the very powerful and stouthearted would venture, having a regard for the large initial investment which this business requires. These patents, through the agreements in which they are enmeshed and the manner in which they have been used, have, in fact, been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired, is today less accessible to free enterprise than when it was first launched.

The exchange of know-how between NL and DP was abandoned in 1940 when, as DP says, the industry matured. The exchange of patents and patent applications continues.

The tonnage limitations in the licenses of American Zirconium and Virginia Chemical was eliminated in 1944. The power of concerted action is still there.

I need not consider whether an exchange of patents, present and future, between competitors, is violative of the Sherman Act. I assume that such an exchange standing alone is innocent. But in the context of the present case,

Associated Press v. U. S., June 18, 1945,
U. S.,

this exchange between two corporations, who between them controlled the entire market, becomes an instrument of restraint, available for use and used, to continue the mastery of the market which NL and DP achieved by means of the illegal international agreements.

In order to give effect to the Sherman Act, plaintiff is entitled to a decree which will restore titanium to the system of free competition; the means of preventing such a development must be destroyed and the power to prevent it must be shorn from those who, by combination, have acquired it.

It is, perhaps, not customary to express, in an opinion, the praise which the attorneys who tried this case deserve for the very high order of professional learning which they brought to it. Nothing, however, restrains me from commenting favorably upon the cooperative attitude exhibited by them which resulted in shortening the trial by many months.¹⁶

A decree will be entered for the plaintiff.

Dated: July 5th, 1945.

SIMON H. RIFKIND
U. S. D. J.

- 1) The following abbreviations will be used to identify the defendants and co-conspirators:

NL	National Lead
Tinc	Titan Company, Inc.
DP	E. I. du Pont de Nemours and Company, Inc.
TP	The Titanium Pigment Company, Inc.
Krebs	Krebs Pigment & Color Corporation
TAS	Titan Co. A/S
IG	Interessengemeinschaft Farbenindustrie Aktiengesellschaft
TG	Titangesellschaft, g.m.b.h.
SIT	Société Industrielle du Titane
ICI	Imperial Chemical Industries, Ltd.
GW	Goodlass Wall and Lead Industries, Ltd.
ISC	Imperial Smelting Corporation
BTP	British Titan Products, Ltd.
NTP or Laporte	National Titanium Pigments, Ltd.
CIL	Canadian Industries, Ltd.
CTP	Canadian Titanium Pigments, Ltd.
Kokusan or KK	Kokusan Kogyo Kabushiki Kaisha
TK	Titan Kogyo Kabushiki Kaisha
Terres Rares	Société de Produits Chimiques des Terres Rares
Thann	Fabriques de Produits Chimiques de Thann et de Mulhouse
Montecatini	Società Anonima Titanium
Aussig	Verein für Chemische und Metallurgische Produktion Aussig

- 2) American Zirconium and Virginia Chemical engaged in the production of only pure TiO_2 . Of extended titanium pigments, NL and DP produced 100% of the amount consumed in the American market.

- 3) "Licensed field" was defined to mean "(1) all methods, processes and apparatus in the field of manufacture and use of all titanium compounds, containing two per cent. (2%) or more of the element titanium in a chemically, mechanically or physically combined state, and mixtures thereof, which can be used as pigments, whether or not adapted for other uses, and (2) all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses".
- 4) Virginia Chemical also licensed DP under one of its patents and applications. TiO_2 produced by Virginia Chemical by the process disclosed in this patent and application was expressly exempted from the quantity and royalty provisions.
- 5) The attorney for the United States has suggested the following definition: "A combination of producers of any product joined together to control its production, sale and price, and to obtain a monopoly in any particular industry or commodity".

Words and Phrases (Permanent Edition) contains no definition of the word; neither does the Federal Digest. Bouvier's Law Dictionary defines cartel thus: Agreements between belligerents authorizing certain non-hostile intercourse between one another, which would otherwise be prevented by the state of war.

In Monograph No. 1, of the Subcommittee on War Mobilization of the Committee on Military Affairs, U. S. Senate, 78th Congress, 2d Session (commonly called the Kilgore Committee) the following is presented:

"Cartels have been defined by two of the foremost members and advocates of such bodies. In the words of Sir Alfred Mond, organizer of Imperial Chemical Industries:

I use the word cartel to include fusion, pooling arrangement quota arrangement and price convention, because a cartel is protean in its form. * * * In an ultra-technical way, a cartel might be defined as a combination of producers for the purpose of regulating, as a rule, production, and, frequently, prices. That does not involve giving up the identity of the different firms. It is not usually made for a period lasting more than a limited time. It does not necessarily carry with it, though in some cases it does, joint selling agencies. Sometimes, too, it carries with it quotas of production. But all this is, perhaps, too narrow a definition. The Germans have a term *Interessen-gemeinschaft* * * * a union or similiarity of interest. The great German Dye Trust started with what they call *Interessen-gemeinschaft*. When first formed it was a fairly loose combination to regulate production and prices. It has been substituted since by an absolute and complete fusion and exchange of shares—what we should call a complete amalgamation—which is the final and most complete form of any kind of cartel which can be imagined.

“In the words of Sir Felix J. C. Pole, chairman of Associated Electrical Industries, Ltd.:

‘A cartel or association usually means an association by agreement of companies or sections of companies having common interests. It is designed to prevent extreme or unfair competition and allocate markets, and it may also extend to interchange of knowledge resulting from scientific and technical research, exchange of patent rights, standardization of products, etc. Competition is not eliminated, but it is regulated. Competition in quality, efficiency, and service takes the place of the crude method of price cutting.’

“These quotations both emphasize the central fact that cartel activities are arrangements among business

enterprises engaged in the same type of industry to avoid some or all forms of competition. Cartel activities are designed to maximize the profits of participants by directly or indirectly maintaining prices at the level of greatest net return.

"International cartels are, of course, cartels which include business enterprises domiciled under more than one government and doing business across national frontiers. A cartel of this type may include the major enterprises operating in a given industrial field throughout the world, and may determine trade policies in that field in most, if not all, of the world's principal markets."

6) *U. S. v. Sisal Sales Corporation*, 1927, 274 U. S. 268.

7) *American Banana Co. v. United Fruit Co.*, 1909, 213 U. S. 347.

8) *Shields v. Barrow*, 1854, 17 How. 129; *Minnesota v. Northern Securities Co.*, 1902, 184 U. S. 199; *Garzot v. De Rubio*, 1908, 209 U. S. 283; *U. S. v. Northern Pacific R. Co.*, C.C.A. 8, 1905, 134 Fed. 715; Cf. *United Shoe Machinery Corp. v. U. S.*, 1922, 258 U. S. 451.

Whatever may be the scope of this rule, it has not interfered with the action of the courts in striking down systems deemed violative of the anti-trust laws even though such systems included leases, licenses, and other forms of agreements, and the lessees, licensees, and other parties to the agreements were not before the court.

Paramount Famous Lasky Corp. 1930, 282 U. S. 30; *Interstate Circuit v. U. S.*, 1939, 306 U. S. 208; *Ethyl Gasoline Corp. v. U. S.*, 1940, 309 U. S. 436; *U. S. v.*

Univis Lens Co., 1942, 316 U. S. 241; *U. S. v. Hartford-Empire Co.*, April 21, 1945, U. S.

Nor were these all cases like *United Shoe Machinery Corp. v. U. S.*, 1922, 258 U. S. 451, where the enjoined covenants were all for the benefit of the lessor, and the injunction did not adversely affect the lessees.

Paramount Famous Lasky Corp. v. U. S., *supra*; *Interstate Circuit v. U. S.*, *supra*; *Ethyl Gasoline Corp. v. U. S.*, *supra*.

Were the rule advocated by NL allowed to operate in the field of restraints upon the foreign commerce of the United States, it would paralyze the enforcement of the law in all cases where one or more of the parties to the conspiracy was an alien corporation over whom the court could acquire no personal jurisdiction. The courts do not so readily permit a frustration of valid national policy. The flexibility of the decree which the court can frame allows for a great degree of accommodation. An example of that is *J. I. Case Co. v. N. L. R. B.*, 1944, 321 U. S. 332.

- 9) This argument is distinct from the "good intention and noble motive" argument which was rejected in *Thomsen v. Caysen*, 1917, 243 U. S. 66, 85.
- 10) Jebesen, unfamiliar with American laws, would not credit this reason, for he could not understand how NL had undertaken to do that which the DP lawyers claimed was prohibited. But perhaps NL was right after all, since for twenty five years it proceeded unmolested and succeeded, with the aid of the unlawful conspiracy, to build a highly profitable business and to retain a dominant position in the industry.

11) KREBS PIGMENT & COLOR CORPORATION

June 28, 1933.

CONFIDENTIAL

W. C. BESCHORMAN, Vice Pres.,
National Lead Company,
111 Broadway,
New York City, New York.

Dear Mr. Beschorman:-

We have considered the various points raised by I. G. in their cable to you with the desire, if possible, to comply with its request.

As you are aware, the Anti-Trust Laws of this country definitely prevent this Corporation from making any commitments respecting the territories of Titangesellschaft and Titan Inc. Further, these several companies are not parties to the Krebs-Titanium Pigment Agreement and so, as to them, we are unable to make any direct commitment. However, since Article II of the Krebs-Titanium Pigment Agreement definitely provides that Krebs is limited both in respect to use and sale to the territories set forth in this Article, we think the result will be eminently satisfactory to your foreign associates. As to controlling the disposition of our products by our customers, we are sure you appreciate the difficulty both from a legal and practical standpoint.

The I. G. request that Krebs grant no sub-licenses or technical aid to others in the territories of the foreign companies, is tantamount to obligating Krebs to grant exclusive licenses. The whole agreement, you will recall, for definite reasons, was placed on a non-exclusive basis. Since all licenses received from Krebs under its foreign patents, are subject to negotiation, we believe there will be no difficulty in working out a solution that will be acceptable to all par-

ties; it may well be that such negotiations will result in exclusive licenses to your foreign associates. Naturally, we shall treat technical information in the same manner as our patents.

The present form of our Agreement is the result of much care and thought on the part of both parties. It embodies, as we see it, a practicable working basis for both companies, as well as for your foreign associates.

Very truly yours,

C. H. RUPPRECHT,

President.

July 12, 1933

I. G. Farbenindustrie
Aktiengesellschaft
Frankfurt (Main)
Gruneburgplats.

Dear Sirs:

Immediately upon receipt of cablegram of June 22nd from Dr. Jebesen, a copy of which is attached, we took the matter up with the Krebs Pigment & Color Corporation, submitting to them a copy of the cable, and take pleasure in handing you a copy of their reply under date of June 28th. Careful-reading of the Krebs letter will surely indicate to you the spirit in which they are entering into this contract and their efforts to meet your views. We feel that experience will prove that such will be the case.

In regard to the phrase "non-exclusive license" to which you call our attention as occurring in Article 5, Paragraph 2, we have to refer to the United States Anti-Trust Laws which absolutely forbid the granting of exclusive license between two manufacturers in the United States as such a practice would tend to

create a monopoly. Therefore, the use of this phrase "non-exclusive license" is simply to comply with the United States Laws and in practice the licenses under each others patents will undoubtedly prove to be, to all intents and purposes, exclusive.

Referring subsequently to the points brought out in your letter of June 20th, under A, B, C, D and E, you will note that the Krebs Company consider themselves limited both as to use, manufacture and selling to the territory granted to them by the agreement. While this agreement does not specifically prevent Krebs from exporting into your territory any products not manufactured under the patents of the Titanium Pigment Company and its associated companies, it will be a difficult matter to discriminate between such manufacture and manufacture under their patents and maintain close and good cooperation, and the practical effect will be that Krebs will refrain from such export.

As to exports by clients of the Krebs Company, we note that Krebs will use all their efforts to prevent any export outside of their territory which would cause any trouble to you in any way.

In regard to licenses, although non-exclusive licenses are specified throughout the agreement, you will note from the letter of Krebs Company that they are not adverse to granting exclusive licenses in case this may be found desirable by you. Under the practice, as we foresee it, these licenses will be given against a nominal payment except in cases of outstanding development.

We also see your point, that by the exclusive license you have given Titan Co. Inc., which has granted exclusive licenses to the Titanium Pigment Co. Inc., you are not in a position to trade with Krebs regarding any American patents belonging to you. However, you may rest assured that your interest in these

respects, which are also our own interests in view of our part ownership in the Titangesellschaft, will be fully and completely looked after.

At one time we considered the question of an agreement between the Titangesellschaft and Krebs covering the points in your letter, but have dropped this idea as we felt that you would be better served to have us look after your interests than to complicate the situation with a separate contract.

The only other point in your letter which we do not believe has been covered is your suggestion that the contract be changed from termination in three years to termination in five years. Frankly, there is no possibility of the contract being terminated at any time that we can foresee, and I am glad that you did not make any especial point of this either in the cable or in your letter of June 20th.

May I add that we certainly appreciate your attitude and the views you have put forward in your letter to Dr. Jebson and trust that you will not be disappointed in the future by following the lines we have suggested. May we ask for further advice from you as to whether the Krebs letter and above make the whole matter satisfactory:

Very truly yours,

W. C. BESCHORMAN,
Executive Vice President.

Copy to—Dr. Kuhne
Dr. Jebson
Mr. Rupprecht
Mr. Tasker, Vice Chairman, British T. P.
Co.

This letter was sent on July 21, 1933.

- 12) The letter was not found in DP's files.
- 13) In view of this finding, I do not reach the question whether doing business with an illegal combination constitutes joining the combination; see *Virtue v. Creamery Package Mfg. Co.*, 1913, 227 U. S. 8; cf. *Direct Sales Co. v. U. S.*, 1943, 319 U. S. 703.
- 14) Compare, *U. S. v. Colgate & Co.*, 1919, 250 U. S. 300; *U. S. v. Schrader's Son, Inc.*, 1920, 252 U. S. 85.
- 15) "In the case at bar, the primary defendants own competing patented processes for manufacturing an unpatented product which is sold in interstate commerce; and agreements concerning such processes are likely to engender the evils to which the Sherman Act was directed." *Standard Oil Co. v. U. S.*, 1931, 283 U. S. 163, 175.
- 16) Over 1400 exhibits were received in evidence.

IN THE
District Court of the United States
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 26-258

UNITED STATES OF AMERICA,

Plaintiff,

against

NATIONAL LEAD COMPANY, TITAN COMPANY,
INC., E. I. DU PONT DE NEMOURS AND COM-
PANY,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

(Filed October 2, 1945).

SIMON H. RIFKIND
U. S. District Judge

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IN THE
District Court of the United States
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

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NATIONAL LEAD COMPANY, TITAN COMPANY,
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Civil No.
26-258

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

FINDINGS OF FACT

1. This is an action by the United States to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890), 15 U. S. C. §§ 1, 2 (1940). The Court has jurisdiction of the subject matter and of the parties. The defendant National Lead Company (NL) is a New Jersey corporation. The defendants Titan Company, Inc. (Tinc) and E. I. du Pont de Nemours and Company (DP) are Delaware corporations. NL and Tinc have offices and are found and transact business in this District. DP has its office and principal place of business at Wilmington, Delaware, but is found and

transacts business in this District. The business of the defendants and their connection with the activities and violations alleged are described in subsequent findings. The Titanium Pigment Company, Inc. (TP) and Krebs Pigment and Color Corporation (Krebs), both corporations, now dissolved, are co-conspirators but are not made defendants. The following foreign corporations are co-conspirators but are not made defendants:

Titan Co. A/S (TAS)

Interessengemeinschaft Farbenindustrie Aktiengesellschaft (IG)

Titangesellschaft, m.b. H. (TG)

Societe Industrielle du Titane (SIT)

Imperial Chemical Industries, Limited (ICI)

Goodlass Wall and Lead Industries, Limited (GW)

Imperial Smelting Corporation, Limited (ISC)

British Titan Products Company, Limited (BTP)

National Titanium Pigments, Limited (Laporte)

Canadian Industries, Limited (CIL)

Canadian Titanium Pigments, Limited (CTP)

Kokusan Kogyo Kabushiki Kaisha (KK)

Titan Kogyo Kabushiki Kaisha (TK)

Societe de Produits Chimiques des Terres Rares
(Terres Rares)

Fabriques de Produits Chimiques de Thann et de Mulhouse (Thann)

Societa Anonima Titanium (Montecatini)

Verein fur Chemische und Metallurgische Produktion
(Aussig)

2. The defendants DP and NL are engaged in the business of manufacturing, selling and transporting titanium pigments in commerce among the several states of the United States and between the United States and certain foreign nations.

3. The defendant NL has assets in excess of \$100,000,000. It is the largest manufacturer of titanium pigments and compounds in the United States and the largest manufacturer of titanium pigments and compounds in the world, manufacturing and selling 76.5 per cent of composite and 46.4 per cent of pure TiO_2 in the United States in 1943. NL conducted all its activities relating to the manufacture and sale of titanium pigments and compounds through TP until the dissolution of the latter in 1936 and thereafter conducted such operations through its own Titanium Division.

4. The defendant NL owned after December 31, 1927, approximately 87 per cent of the stock of TAS and since January 1944 has owned or controlled approximately 99 per cent of said stock.

5. The defendant NL owned 87 per cent of the stock of Tinc from the date of its incorporation in 1929 to January 28, 1944, at which time it acquired and now owns 100 per cent of said stock.

6. The defendant Tinc since its incorporation in 1929 acquired and now owns the following percentages of voting stock in the following named corporations:

BTP—44%

TG —50%

SIT —57.638%

TK —18.5%

7. The defendant Tinc, in 1929, acquired some of the business assets of TAS and assumed all of the obligations of and was entitled to receive all the benefits of contracts Exhibits A, A-1, A-2, B, B-1, B-3, C, C-3, C-8 and other contracts of TAS.

8. The defendant Tinc, since its incorporation, has owned a number of patents and has held exclusive licenses, with the right to grant sublicenses, under patents pertaining to the manufacture and use of titanium pigments and compounds. A majority of Tinc's officers and directors are and since its organization have been officers and directors of defendant NL.

9. The defendant DP is one of the largest chemical companies in the United States with assets in excess of \$1,000,000,000. The defendant DP is also one of the largest manufacturers of titanium pigments in the United States, manufacturing and selling approximately 23.5 per cent of the composite pigments made in the United States and 45.1 per cent of the pure TiO_2 made in the United States in 1943. It is also the second largest manufacturer of titanium pigments and compounds in the world. The defendant DP entered the titanium pigment business in July, 1931, and until January 1, 1936, conducted all its activities relating to the manufacture and sale of titanium pigments and compounds through Krebs, after which time it conducted its titanium pigment activities through the Krebs Division of DP.

10. Krebs was a Delaware corporation formed in July, 1931, by the defendant DP, the Grasselli Chemical Co., a wholly-owned subsidiary of DP, and the Commercial Solvents Corporation to acquire the business of Commercial Pigments Company (referred to herein as CP), the Krebs Pigment & Chemical Co. and the pigment business of the Grasselli Chemical Co. CP was the only one of the foregoing companies engaged in the manufacture and sale of titanium pigments and compounds prior to the acquisition of its business by Krebs. The defendant DP acquired a 70 per cent stock interest in Krebs at that time and committed itself to engage in the titanium pigment business only through Krebs. The defendant DP acquired the remaining 30 per cent of the stock of Krebs on December 31, 1934. On December 31, 1935, defendant DP acquired all the assets of Krebs and assumed all the obligations of Krebs, thereafter operating the titanium pigment and compound business of said Krebs directly through the Krebs Division of the defendant DP. Krebs continued to operate under the Blumenfeld United States patents and process after it acquired the assets of CP in July, 1931, as has the defendant DP at all times since December 31, 1935. In August, 1933, Krebs acquired by license the right to use all United States patents owned or thereafter acquired by TP or NL which related to the manufacture and use of titanium pigments; and subsequently, as will appear, it acquired by licenses additional United States patent rights from NL's foreign associates. C. H. Rupprecht was a director and president of Krebs from its incorporation until its dissolution and was in charge of the titanium pigment operations of the defendant DP from July, 1931, until his decease September 10, 1944. Krebs also owned a substan-

tial stock interest in Travancore Minerals Company, Ltd., which held rights in extensive ilmenite sand deposits in India. This stock was among the assets of CP acquired by Krebs.

11. TP was a Maine corporation organized in 1916 and was engaged in the manufacture of titanium pigments and compounds from 1920 until its dissolution in 1936. After 1920 the defendant NL acquired stock in said company until December 30, 1932, at which time NL owned all the stock of TP. NL controlled all the activities and policies of TP after 1920 until its dissolution in 1936, at which time all of the assets and liabilities of TP were taken over and its titanium business continued by the defendant NL as a division of NL. TP owned and was the exclusive licensee of many patents relating to the manufacture and use of titanium pigments and compounds, including the Barton-Rossi and Jepsen patents and processes. TP manufactured composite pigments principally; but it also began manufacturing a pure TiO_2 after 1928 in competition with CP.

12. CP was a corporation formed by Commercial Solvents Corporation in 1928. CP acquired the Blumenfeld and other patents in the United States relating to the manufacture and sale of titanium pigments and compounds and from 1928 was engaged in the manufacture of titanium pigments in the United States; operating a plant at Baltimore, Md. It manufactured a pure TiO_2 pigment only and sold it in competition with TP. All its assets were acquired and some of its obligations were assumed by Krebs in July, 1931.

13. TAS was a Norwegian Corporation with its principal place of business at Fredrikstad, Norway, and from

some time prior to 1920 until about 1929 was engaged in the manufacture of titanium pigments and compounds in Norway. Said TAS owned the Jebsen and other patents relating to the manufacture of titanium pigments and compounds and also controlled through A/S Titania large deposits of ilmenite in Norway. It was authorized by TP to use the Barton-Rossi and other patents and processes relating to the manufacture and use of titanium pigments and compounds in 1920. Its activities and policies have been controlled by the defendant NL since 1927. It ceased the manufacture of titanium pigments and compounds in 1929. Thereafter, substantially all titanium pigments and compounds sold by TAS were purchased from TG. TAS continued to function as selling agency for defendant Tinc in part of the territory reserved to Tinc after 1929.

14. IG is a German corporation with its principal place of business in Frankfurt, Germany, and is one of the largest corporations in Germany and one of the largest chemical companies in the world.

15. TG is a German corporation with its principal place of business at Leverkusen, Germany, and was organized in October, 1927, by TAS and IG and in 1939 was the largest producer of titanium pigments and compounds in Europe. TG was licensed to use the Barton-Rossi and Jebsen patents and processes and owns and is licensed to use other patents relating to the manufacture and use of titanium pigments. TG has a right to use some of the DP patents relating to the manufacture and use of titanium pigments and compounds.

16. SIT is a French corporation with its principal place of business at Paris, France. It received a license

from TAS in 1927 to manufacture titanium pigments and compounds in France under the Barton-Rossi and Jepsen patents. No factory was ever erected by the said company to manufacture titanium pigments or compounds in France. In 1927 defendant NL purchased a controlling interest in SIT. SIT has a right to use some of DP's patents relating to the manufacture and use of titanium pigments and compounds.

17. ICI is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at London, England, and is the largest manufacturer of chemicals in the British Empire with assets in excess of £100,000,000.

18. GW is a corporation organized under the laws of the United Kingdom with its principal office and place of business in London, England, and is the largest producer of lead and lead pigments in the British Empire.

19. ISC is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business in London, England, and is one of the largest producers of pigments in the British Empire.

20. BTP is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Billingham, England, and was registered in August, 1930, by ISC with the knowledge and approval of the defendants NL and Tinc. BTP is the largest manufacturer of titanium pigments and compounds in the British Empire. BTP is licensed to use the Barton-Rossi and Jepsen patents and processes and owns and is licensed to use other patents relating to the manufacture of titanium pigments.

ments and compounds. BTP also has a right to use some of the DP patents relating to the manufacture and use of titanium pigments and compounds.

21. ICI, GW, and ISC subscribed to and each owns 17 per cent of the stock of BTP. Each acquired said stock on or about the time said BTP commenced active operations in the titanium pigment and compound business in the British Empire in February, 1933.

22. Laporte is a corporation organized and existing under the laws of the United Kingdom with its office and principal place of business at Luton, England, and is the only other producer of titanium pigments and compounds in the British Empire and manufactures titanium pigments and compounds under the Blumenfeld patents and process in England.

23. CIL is a corporation organized and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada, and is the largest chemical manufacturer in Canada. Approximately 43 per cent of its stock is and has been owned by the defendant DP since 1928 and approximately 43 per cent of its stock is and has been owned by ICI since 1928.

24. CTP is a corporation organized in January, 1937, and existing under the laws of the Dominion of Canada with its office and principal place of business at Montreal, Canada. Defendant NL has since the incorporation of CTP owned 49 per cent of the voting stock of CTP. The balance of the voting stock is owned by CIL. CTP is the only company engaged in the titanium business in Canada

and owns and/or is licensed to manufacture titanium pigments under the Blumenfeld, Barton-Rossi, Jebson and other patents in Canada. Said CTP is not now manufacturing titanium pigments and compounds in Canada, since 1939 it purchased all of its requirements for sale in the Dominion of Canada from NL and to a slight extent from DP. NL is required to supply the requirements of CTP on a cost plus basis until CTP commences the manufacture of titanium pigments or compounds.

25. KK is a Japanese organization and is the largest manufacturer of paints in Japan and is a subsidiary of Nippon Sangyo, one of the largest industrial enterprises in Japan.

26. TK is a Japanese organization existing under the laws of Japan with its office and principal place of business in Tokyo, Japan. TK was organized in 1936 by Tinc, IG, TG, Terres Rares, and Thann. Since its organization approximately 50 per cent of the stock of TK has been owned by KK, 18½ per cent by Tinc, 16½ per cent by IG, and 15 per cent by Terres Rares and Thann. TK is the largest manufacturer of titanium pigments and compounds in Japan, owns many patents relating to the manufacture and use of titanium pigments and compounds, and is licensed to use the Barton-Rossi, Jebson and Blumenfeld patents and processes in the Japanese Empire. TK also has a right to use some of the DP patents relating to the manufacture and use of titanium pigments and compounds.

27. Terres Rares is a French corporation with its principal place of business at Paris, France; it acquired the Blumenfeld and other patents relating to the manufacture

and use of titanium pigments and compounds in or about the year 1920.

28. Thann is a French corporation with its office and principal place of business at Paris, France, and is the only manufacturer of titanium pigments and compounds in France. It manufactures such pigments and compounds under the Blumenfeld patents and process.

29. Montecatini is an Italian corporation with its office and principal place of business at Milan, Italy, and is a subsidiary of the largest manufacturer of chemicals in Italy. Montecatini is the only manufacturer of titanium pigments and compounds in Italy and is licensed to use the Blumenfeld patents and process.

30. Aussig is a corporation organized under the laws of Czechoslovakia with its office and principal place of business at Prague, Czechoslovakia. It is the largest chemical company in Central Europe and is the only manufacturer of titanium pigments and compounds in Czechoslovakia and is licensed to use the Blumenfeld patents and processes.

31. American Zirconium Corporation (referred to herein as Zirconium) is a subsidiary of the Glidden Co. and sells and ships TiO_2 from its Baltimore, Md., factory into other states in the United States. Zirconium owned certain patents relating to the manufacture of titanium pigments and compounds prior to 1934. It was first licensed to use certain TiO_2 patents by DP on August 19, 1935, by license agreement dated January 1, 1935. Zirconium was licensed by NL to use all of its patents relating to the manufacture of titanium pigments and compounds

on May 6, 1935. The license from the defendant NL to Zirconium was cancelled by agreement (Ex. NL 29) on March 9, 1944. Zirconium manufactures only pure TiO_2 . It produced less than 5 per cent of the aggregate production of TiO_2 produced in the United States between 1935 and 1943.

32. Virginia Chemical Corporation (referred to herein as VC) is a subsidiary of American Cyanamid Company and formerly a subsidiary of Interchemical Company and sells and ships TiO_2 between some of the states of the United States. VC was organized in 1935 to manufacture titanium pigments. It owned certain patents relating to the manufacture and use of titanium pigments and compounds. The defendant DP first licensed VC to use certain of its TiO_2 patents on August 5, 1937. VC produces only pure TiO_2 and produced less than 5 per cent of the aggregate production of TiO_2 in the United States between 1936 and 1943.

33. Titanium pigments and compounds are manufactured from titanium which is the ninth most abundant element on the earth's surface. Titanium is contained in ilmenite and other minerals. Sands and rock formations containing ilmenite are found in India, the United States, Norway, Brazil, and elsewhere throughout the world. Titanium pigments are possessed of great opacity, hiding power and chemical inertness, and are largely displacing other pigments such as lithopone and white lead. Titanium pigments are used in the manufacture of paints and are also used in the manufacture of rubber, glass, paper, vitreous enamels, and many other products. Titanium pigments are sold in the United States and abroad in competition

with other forms of white pigments, notably lithopone and white lead, which are sold in the United States in substantial quantities by a number of commercial concerns other than the defendants and some of which are sold by the defendants.

In and before 1920 there was no substantial trade or commerce in, and no commercial manufacture of, titanium pigments for use in paint, paper, rubber, or other products; pigments used for such purposes were lithopone, white lead, and zinc oxide. The use of metallic titanium in alloys was under development by Titanium Alloy Manufacturing Company at Niagara Falls, N. Y., and chemists engaged in that work (principally Barton and Rossi) were aware of the possibilities of titanium dioxide as a pigment; several important patents on processes and products had been taken out by them, largely for the manufacture of composite titanium pigments; and a subsidiary, TP, had been formed by Titanium Alloy to engage in further research, development, and promotion in the pigment field. Before 1920 tests and demonstrations conducted by TP had attracted the attention of large manufacturers of pigments and paints,—Pittsburgh Plate Glass (paints), New Jersey Zinc (pigments), the defendant DP (pigments and paints), and the defendant NL (pigment),—who investigated TP's processes and products; and this led in 1920 to purchase by NL of 10% of the stock of TP, with an option to purchase up to 50%.

While the research and experimental work described was going on in the United States, Gustav Jebsen, a Norwegian chemist and business man, was making a similar investigation, albeit along different lines, in Norway—this in connection with his search for means of putting to industrial use large deposits of Norwegian ilmenite-bearing ore.

By 1920 Jebsen and his associates had perfected processes patented in Norway, the United States, England, Germany, and in other countries, an important feature of which was disclosure of means for producing relatively pure titanium dioxide pigments by direct application of relatively small quantities of sulphuric acid—a process much less costly than that then developed and in use experimentally at Niagara Falls. Though the Norwegian chemists were aware of the possibilities of composite pigments, they had not perfected processes for the manufacture of such products. In 1920 the process and product patents of Jebsen and his associates were held by TAS, a Norwegian Company.

34. Joseph Blumenfeld, a chemist and managing director of Terres Rares, in or about 1922 obtained patents relating to the manufacture of titanium compounds which he assigned to Terres Rares. Blumenfeld patents issued both in the United States and various foreign countries. While CP was entitled to receive rights under all Blumenfeld titanium pigment inventions patentable in the United States, it was not licensed under and did not own any Blumenfeld patents which issued in foreign countries.

35. The production of titanium pigments in the United States has risen from 100 tons (on the basis of pure TiO_2 content) in 1920 to approximately 110,000 tons in 1943 with a peak production of approximately 128,000 tons in the United States in 1941. The total production of titanium pigments and compounds outside of the United States has shown less growth, the estimated foreign production of titanium pigments and compounds being approximately 1,000 tons in 1920 and approximately 23,000 tons in 1938.

36. Before World War II the leading American manufacturers of titanium pigments, the defendants NL and DP, obtained their supplies of ilmenite from India. Since about August, 1942, however, their supplies have come mainly from a New York deposit owned by NL and operated by NL pursuant to and in accordance with a directive of Office of Production Management approved by the Attorney General of the United States. NL was directed to, and did, offer participation in this project to each of the other producers of titanium pigments in the United States. The offer was accepted by DP. NL invested more than \$10,000,000 in this enterprise.

37. Prior to 1930 the principal producers and sellers of titanium pigments in the world were divided into two groups, the NL group and the Blumenfeld group. The NL group included TP, TAS, SIT, TG, and TINC and were using principally the Barton-Rossi and Jebsen patents and processes for the manufacture of titanium pigments. Each of the companies named had been allocated exclusive marketing territories throughout the world by agreements. The Barton-Rossi patents were and are owned either by TP or NL. The Jebsen patents were and are owned either by TAS or TINC. The patents upon which NL's titanium business was originally founded in 1920 were Barton-Rossi and Jebsen patents. DP and NL were of the opinion that these would expire by the end of 1934. The Blumenfeld group consisted of Terres Rares, Thann, Aussig, Montecatini, and CP to each of which companies Terres Rares had allocated exclusive territories throughout the world. A number of United States titanium pigment patents issued other than the Barton-Rossi and Jebsen patents, including the United States patents covering the Blumenfeld process,

some of which do not expire until 1948 or thereafter. All of the companies engaged in the manufacture of titanium pigments in the United States on a commercial basis use a sulfuric acid process based on the Barton-Rossi, Jebsen, and Blumenfeld patents. The patents relating to titanium pigments and compounds comprise considerably more process claims than product claims. The process claims, with the exception of those of the so-called Rutiox patents which relate to the production of rutile-type titanium pigments, cover for the most part improvements in manufacturing processes originally disclosed in the Barton-Rossi, Jebsen, and Blumenfeld patents, which improvements have led to the improved present-day commercial titanium pigments. The product claims cover practically all such improved titanium pigments; thus, of 23 different grades of titanium pigments (i.e. different products) sold by NL, 21 are covered by unexpired patents. The validity of none of these patents was ever passed upon by any court of record in the United States.

38. The Auer Company developed a process for the manufacture of titanium pigments and compounds in Germany in the early 1920's, was not successful, and ceased manufacturing in 1931. The Auer patents were acquired in November, 1932, by Krebs. They were not of much consequence.

39. TP, on January 1, 1933, owned approximately 67 United States patents and 22 patent applications relating to the manufacture and use of titanium pigments and compounds. It also had the right to use by exclusive license 34 United States patents and 13 patent applications of its foreign associates. TP owned 229 patents in 24 foreign

countries prior to January 1, 1933. TP commercially used only 25 patents and patent applications out of a total of 136 patents and patent applications (18 per cent) which it owned or had the right to use prior to January 1, 1933.

40. NL now owns or controls 75 United States patents and 28 patent applications relating to the manufacture and use of titanium pigments and compounds and has exclusive licenses on 2 TAS, 18 Tinc, 17 IG and 1 TG patents and 4 TG patent applications. It also owns 3 patents in Canada and has non-exclusive licenses on 7 patents in South and Central American countries. NL is also licensed to use 156 DP patents and 30 DP applications and is accordingly entitled to use approximately 269 United States patents and 63 applications. It commercially uses only 66 patents and applications out of a total of approximately 332 which it owns or has the right to use or approximately 20 per cent. There is no evidence that NL obtained patents for the purpose of "blocking" or "fencing".

41. Krebs owned approximately 30 United States patents and 24 applications relating to the manufacture and use of titanium pigments and compounds and owned no foreign patents or applications prior to January 1, 1933. Krebs commercially used a total of 18 such patents and applications or approximately 33 per cent of the total which it had the right to use. DP now owns approximately 174 United States patents and 32 applications. It also owns 48 patents and 14 applications in Canada, 13 patents and 9 applications in England, 20 other patents in 7 other countries including 8 in Japan. It is licensed to use 96 patents and 27 applications of NL or its foreign associates in the United States. It accordingly now owns or has the right to use approxi-

mately 270 United States patents and 59 applications. It uses commercially approximately 70 such patents and applications or about 20 per cent. There is no evidence that Krebs or DP obtained patents for the purpose of "blocking" or "fencing".

42. There are now four producers of titanium pigments in the United States: NL, DP, American Zirconium and VC. As will hereinafter appear, NL and DP have cross licensed each other under their respective patents. Zirconium entered the field in 1935 with licenses from both NL and DP; the NL license was cancelled by agreement in 1944. VC entered the field in 1937 with a license from DP.

43. At no time were there imports of any consequence from abroad. In and after 1922 the tariff applicable to titanium compounds was 30% ad valorem.

44. On July 30, 1920, TP and TAS entered into an agreement, in writing, Ex. A which is uncanceled. This agreement was negotiated on behalf of TP by McCarty, a vice president of NL, now dead, and on behalf of TAS, by Jebson, who testified at the trial.

The essential features of the agreement are:

(a) The field to which the contract was to apply was defined as including all substances containing above 2% of titanium (unless such substances contained by weight more than 5% of a metal other than titanium in its purely metallic state) and all apparatus, methods, and processes useful in obtaining or manufacturing such substances (except as stated). The intention was to cover processes, substances, and apparatus in the titanium and titanium compound field.

(b) TAS agreed to grant to TP and the latter agreed to accept "a license exclusive of all others including" TAS under all "existing or future" patents of the Norwegian company; but only in or for territories within North America (defined as including the continent of that name, Central America, and Panama); and TP agreed to grant to TAS the correlative rights, but only outside North America, under the existing or future patents of TP. The parties agreed not to sell outside their respective territories, except that reciprocal non-exclusive rights of sale were reserved for South America.

(c) Detailed provision was made for exchange of copies of applications for patents filed by the parties or their other licensees, and for the filing and payment of expenses incidental to the prosecution of such applications and maintenance of patents in territories outside the territory of each; and there was provision for assignment by each company to the other in case either party elected not to prosecute applications or maintain patents outside its territory.

Neither party would ever question or contest the validity of any patent of the other under which it is licensed (within the licensed field).

(d) TAS made TP the exclusive agent of TAS for sales by TAS in North America, such sales to be at prices and on terms determined by the agent, and TP similarly made TAS its sole agent for sales by TP outside North America and South America. (With a view to "the widest possible development of titanium products in the 'Licensed Field'", it was agreed that, notwithstanding the agencies provided for, importations of "finished articles"—that is, paint, paper, rubber, glass, etc.—containing titanium prod-

ucts of the principal, its licensees or sublicensees, would be permitted provided such products did not constitute such an important part of such finished articles that sales within the agent's territory would substantially interfere with the agent's sales of its own titanium products.)

(e) Each party would impart semi-annually to the other full and accurate information in detail as to knowledge obtained in and applicable to the "licensed field", and would permit the other to inspect and study operations at its plants (exclusive of research laboratories).

(f) The reciprocal grants of exclusive licenses would extend to December 31, 1936, and thereafter for periods of ten years each, with provision for termination by notice to be given at least five years before the end of any such period; and it was agreed that upon such termination each would receive for itself and its licensees within its territory a non-exclusive license under inventions covered by existing patents or applications of the other, but that in other respects the obligations, liabilities, and benefits would cease. (Notice of termination has never been given).

(g) In Article XIV of the 1920 agreement (mentioned by number because of its significance in connection with later agreements) it was provided that each company would have the right, so long as it held an exclusive license from the other under the 1920 agreement, to grant licenses under its own patents and sublicenses under the other's patents on condition, nevertheless, that every such licensee or sublicensee would (i) grant to the party to the 1920 agreement other than its licensor its patent rights in the "licensed field" identical in character, territorial scope, and duration

to those given by its licensor to the other party to the 1920 agreement, (ii) would appoint such other party its sole agent as specified above in respect of its licensor, and (iii) would impart technical information to such other party in the same manner and to the same extent as its licensor. The obligations of TP under this contract were assumed by NL in 1936. The obligations of TAS under this contract were assumed by Tinc in 1929.

45. Simultaneously with the execution of the contract Exhibit A, defendant NL entered into a contract with TAS and TP, Exhibit A-1, which has not been cancelled. NL agreed to respect the provisions of contract Exhibit A and to promptly assign to TP all patents, inventions and improvements relating to titanium pigments or compounds which it then used or might thereafter acquire or whichever should be at its disposal throughout the world. In a separate contract, Titanium Alloy, also a stockholder in TP, agreed with TP and TAS to assume the same obligations as NL.

46. Defendant NL and TAS had a three fold purpose in bringing about and entering into the aforementioned agreements of 1920. The first was to promote the more rapid development of the titanium business by securing to each the right immediately to use the processes and products covered by the patents held by the other, together with future developments and technological improvements and "know how", and consequently the licenses received by each company could be fully utilized, and neither would be inclined nor able to withhold information from the other, nor make use of inventions or developments of the other for or in connection with further inventions or developments not

fully shared with the other. The second was to keep these patent rights and technological know-how as the exclusive possession of the contracting parties and their respective sublicensees under Article XIV. The third was to prevent competition between the parties to the agreement and between their respective sublicensees and between each of the parties and the sublicensees of the other. The agreements had their intended effect.

47. Between 1920 and 1927 TAS suffered business and financial difficulties which led in 1927 (when IG was negotiating for the purchase of its stock; then controlled by Norwegian banks) to the purchase by NL of 87% of the stock of TAS (Jebesen retaining 13%). Since 1929 the rights and obligations of TAS under the 1920 agreement have been held by Tinc, a Delaware company in which NL now owns all the stock. The intended purpose of the acquisition of control of TAS by NL was to utilize TAS and the contract of 1920 to further control competition in the manufacture of titanium pigments and compounds in all markets of the world including the United States.

48. This purpose was accomplished. The defendant NL and TAS agreed to have TAS and subsequently defendant Tinc form in each of the important industrial countries of the world, in association with a local corporation or firm which contemplated the manufacture and sale of titanium pigments and compounds or which could contribute to the technical or commercial development or which threatened to be a serious competitor of NL and TAS, a new company in which NL or TAS were to have a part interest. Any new company so formed was to be given certain territory in which it would have the exclusive right

to manufacture and sell titanium pigments and compounds free from any exports into said territory by NL. The new company so organized was to refrain from competing with NL in its territory (the United States and other countries of North America) or in the territory of any other company associated with NL. TAS and subsequently defendant Tinc were to make said contracts providing for the formation of the new companies and NL was to be bound to adhere to all of the territorial restrictions placed on TAS and subsequently defendant Tinc in such contracts by virtue of contract Exhibit A. All the present and future patents belonging to NL or TAS or any of the companies associated with either in the formation of such new companies, as well as those of the new companies to be organized, were to be licensed exclusively to NL for North America and to the new companies to be organized for their respective exclusive territories and to TAS and subsequently defendant Tinc for the rest of the world.

49. On or about March 3, 1927, TAS entered into a written contract, Ex. B, under which TAS allocated France and its territories, except those appurtenant to the territories of North and South America, to SIT as its exclusive territory in which to engage in the titanium pigment business. SIT assumed all the obligations imposed upon TAS by Exhibit A for the territory allocated to SIT and was entitled to receive all of the benefits for this territory to which TAS was entitled by Exhibit A. This contract Exhibit B is still uncanceled and by its terms is not to be terminated before 1951. (TAS owned about 20% of the French company; NL acquired an additional 58%, which in 1929 was transferred to Tinc; the remainder was held in France by members of the public.)

50. The hope that the French company would use its license from the Norwegian company to manufacture in France; and thus contribute to the fund of processes and technical information available to TAS and TP, was not realized; SIT served merely as a local selling agency for titanium pigments produced elsewhere.

51. Prior to 1927, NL regarded IG as either a potentially invincible competitor or the most powerful ally. NL and TAS entered into negotiations with IG in 1927 and in or about October, 1927, nine separate contracts were entered into (Exs. C to C-8, inclusive). TAS entered into a contract with IG to create TG. IG agreed to engage in the titanium pigment business only through TG and TAS agreed not to engage in the titanium pigment business in the territory allocated to TG except through TG.

In a series of ancillary agreements IG undertook (i) to provide a factory site and building near its Leverkusen works (rent at 6% of the value of the building); (ii) to furnish steam, gas, water, and electricity (at cost), (iii) to supply transportation facilities (at reasonable prices), and (iv) to deliver raw materials (at cost plus 10%, but not more than the competition charged, with provision for "most-favored" customer treatment). IG was appointed agent of TG for sales in the territory allocated to TG. TG agreed to satisfy its ore requirements by purchases from TAS at cost plus 30-50%.

TG was to confine its manufacturing and selling operations to the exclusive territory allocated to it by TAS, to wit, Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Rumania, Serbia, Croatia, Slovenia, Bulgaria, Greece, Turkey, Japan, China and Spain. TAS was granted the rest of the world as its territory.

IG agreed to grant exclusive licenses to TG on all patents it then owned or thereafter acquired, methods and experience relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract (Ex. C-2). "Licensed field" was defined as "all methods and processes in the field of manufacture of titanium compounds containing two per cent (2%) or more of the element titanium as well as the titanium compounds themselves". TAS was given the right to acquire such titanium pigments and compounds as it desired for sale in its territory from TG at cost. Such pigments or compounds so purchased by TAS could only be sold outside TG's territory. TAS granted an exclusive license to TG of all its then owned or thereafter acquired patents, methods and experience relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract, for use in the territory assigned to TG. TG granted to TAS for its territory (the rest of the world exclusive of the territory allocated to TG) an exclusive license of its then owned or thereafter acquired patents, methods and experiences relating in any way to the manufacture or use of titanium pigments or compounds as defined within the limits of the licensed field in said contract.

Both TG and TAS agreed not to export titanium pigments into the territory of the other party without its consent and to impose the same obligations upon their customers.

TG and TAS each agreed not to import into the territory of the other party finished articles (e.g. paint, rubber, glass) manufactured by it; but to permit the importation of finished articles by customers purchasing titanium pig-

ments or compounds from it, subject to the limitations on imports of finished articles into North and South America under the agreement of 1920, Ex. A.

Both TAS and TG were allowed to grant to others licenses of their own or licensed patents provided the licensee or sub-licensee agreed to grant to the other party to the contract an exclusive license under all such licensee's or sublicensee's present and future patents relating to the manufacture and sale of titanium pigments or compounds for the territory of such other party (TAS or TG) and to exchange all technological experience and information and provided further that such licensee or sublicensee agreed to respect the exclusive territory of such other party and to assume the same obligations imposed by contract Exhibit C-3 on both TAS and TG with respect to imports and sales into each other's territory.

These arrangements were to run until 1957 and are automatically renewable for 10-year periods thereafter. They have not been cancelled by the parties.

After the execution of the contract Exhibit C, TG erected a factory for the manufacture of titanium pigments at Leverkusen, Germany, and the business was conducted in accordance with the provisions of these contracts (Exs. C to C-7, inclusive).

52. Prior to 1933, NL and Tinc believed that ICI and GW were planning to engage in the manufacture of titanium pigments and compounds in Great Britain, and ICI had begun development work preparatory to engaging in the manufacture and sale of titanium pigments and compounds. NL and Tinc were apprehensive of their competition, especially as ICI was a very powerful corporation,

although it had never manufactured pigments. Defendant Tinc was engaged in selling titanium pigments in Great Britain since 1928 to a modest extent. NL and Tinc entered into negotiations with ICI, GW and ISC to create BTP through which NL, Tinc, ICI, GW, and ISC would jointly engage in the titanium pigment business in the British Empire (exclusive of North America). Defendant Tinc on or about March, 1933, entered into the contracts (Exs. F to F-6, inclusive). Tinc agreed that it would not conduct any operations relating to the manufacture and sale of titanium pigments and compounds within the British Empire as defined in said agreements except through BTP; and ICI, ISC, and GW agreed to conduct any of their operations, relating in any way to the manufacture and sale of titanium pigments and compounds, anywhere through BTP exclusively. Subject to restrictions on transfer, the voting shares of BTP were distributed among Tinc—49% (with the right to allot 5% to R. W. Greef & Co., Ltd., which had been the British sales agent of TAS and, later, Tinc), ICI—17%, ISC—17%, and GW—17%. Tinc received the right to name three of the six directors, but it was stipulated that the chairman must be one of the directors named by the British shareholders. The agreement was for thirty years, with severely limited provisions for retirement. BTP was to confine all its operations relating to the manufacture and sale of titanium pigments and compounds to the British Empire, exclusive of any portions thereof within or appurtenant to North and South America. ICI, ISC, and GW each granted and agreed to grant to BTP an exclusive license, or where it was not entitled to do so, a non-exclusive license, to all its present and future patents, processes and subject matter within

the licensed field, defined to mean "all methods and processes in the field of the manufacture of titanium compounds containing two per cent (2%) or more of the element titanium as well as the titanium compounds themselves" (but limited in case of ICI to titanium oxide and titanium pigments); with the right to grant sublicenses; and each grantor agreed that it would supply BTP with copies of its applications for patents in the "licensed field" and, at the request and expense of BTP, would prosecute similar applications in countries designated by BTP.

It was agreed by Tinc and BTP that they would exchange licenses, patent applications, and technical information, and conduct their operations in and with reference to the British Empire (excluding Canada, Newfoundland, and certain other areas), in accordance with the principles of the 1920 agreement above described.

Tinc granted and agreed to grant BTP an exclusive license for the manufacture and sale of titanium pigments and compounds, in the territory allocated to BTP, under all its then owned or thereafter acquired patents, processes and subject matter within the scope of the licensed field. BTP granted and agreed to grant Tinc for the territory of Tinc (the rest of the world) a similar exclusive license of its present and future patents and subject matter within the scope of the licensed field. Both BTP and Tinc agreed not to export any titanium pigments or compounds into the territory of the other without the latter's consent, and further agreed to impose the same obligation upon their customers. Each party agreed not to import into the territory of the other finished articles manufactured by the former; customers of each and of exclusive licensees and sublicensees were permitted to make such importations pro-

vided the importation of such finished articles did not interfere substantially with the sale of titanium pigments or compounds by the other party in its own territory. Each party was allowed to grant sublicenses within its territory provided that neither party could grant licenses under its own patents or under any patents licensed to it under contract Exhibit F-1 unless the licensee or sublicensee agreed to grant to the other party to the contract (BTP or Tinc) an exclusive license under all the present and future patents of such licensee or sublicensee relating to the manufacture and sale of titanium pigments or compounds for the territory of such other party (Tinc or BTP) and unless the licensor (BTP or Tinc) required the licensee or sublicensee to agree to respect the territory of the other party and to impose upon such licensee or sublicensee all of the obligations imposed upon the other party (BTP or Tinc) with respect to the territory of the other in its contract Exhibit F-1. Tinc transferred to BTP all of its British Empire titanium pigment business pursuant to said contract. The contract Exhibit F-1 is by its term to run until 1963 and is uncanceled. The right of TAS to buy 50% of the TG production at cost (and more at cost plus 10%) having been transferred to Tinc, the latter agreed until such time as BTP commenced to manufacture, and for two years thereafter, to supply BTP's requirements at cost. TG supplied BTP with titanium pigments for its markets until BTP constructed a factory. BTP erected a factory for the manufacture of titanium pigments at Billingham and BTP became the largest manufacturer of titanium pigments in the British Empire. The defendant DP had knowledge of the negotiations between ICI and Tinc which culminated in contracts Exhibits F to F-6, inclusive. Tita-

nium was excluded from the Patents and Process Agreement of 1929 between DP and ICI.

53. In February, March, and April, 1943, there were conversations between representatives of NL and members of the Antitrust Division, Department of Justice, relating to a proposed consent decree. The conversations were suggested by the Division's pending investigation of the titanium pigments industry and antedated the indictment against the defendants herein and Messrs. Rockwell, Garesche, and Jebson of NL, and another, returned in this District June 28, 1943. At a pre-trial conference in this case held October 30, 1944, counsel for NL tendered a form of contract agreed to, but not executed, by NL and the British companies. A copy of the proposed agreement was received in evidence at the trial, NL Ex. 30. The parties are ICI, ISC, GW, Tinc, BTP, and NL, and the proposed agreement provides in substance as follows:

(a) Licenses exchanged by BTP and NL (Tinc) will be non-exclusive and royalty free, with the right to grant non-exclusive sublicenses but only to parties who will license BTP or NL, as the case may be, on a non-exclusive, royalty free basis under the patents and applications of such sublicensees.

(b) The licenses will be without restriction as to production, shipment, sale, or use of titanium compounds, and it is provided that neither the 1933 British agreements nor the 1920 agreement will preclude BTP or NL (or Tinc) from manufacturing, selling, or using in, or from shipping from or to, any place in the world, titanium compounds or any product, finished or unfinished, or from otherwise fully exercising the grants made by them.

(c) It is agreed that the holdings of voting shares in BTP will be rearranged so as to insure that NL (or Tinc), ICI, ISC, and GW will each hold the same number of shares.

(d) The right of NL to name three directors of BTP is cancelled, and NL has agreed to refrain from taking any part in or exercising any influence in respect of deliberations or decisions of BTP concerning any business of BTP within, from, or to the United States.

(e) All restrictions on the disposition by NL of its shares of BTP contained in the 1933 agreements are cancelled, and it is agreed that the Articles of Association will be amended to remove therefrom all such restrictions.

(f) The proposed agreement supersedes, in so far as inconsistent therewith, the 1933 agreements, and to the extent that any provision or provisions of the 1933 agreements are inconsistent therewith they are deemed to be amended.

(g) The license agreement (Ex. F-1) between Tinc and BTP made in March 1933 is cancelled.

(h) The agreement for exchange of licenses under patent rights hereafter acquired may be terminated by BTP and NL at the end of any year by three years previous notice in writing, or by NL by notice given at any time pursuant to order of this Court, or by BTP by notice given at any time pursuant to order of competent authority in Great Britain pursuant to the Defense Regulations 1941 or pursuant to the order of any competent court in Great Britain.

54. Prior to 1936 local Japanese companies were planning to manufacture and sell titanium pigments and com-

pounds in Japan. NL, Tinc, IG, and TG believed that such Japanese companies would engage in exports which would lead to competition in all the markets of the world including the United States. KK had been agent for TAS and subsequently for IG in Japan. Tinc, TG, IG, Terres Rares, Thann, KK and Doitsu as trustee for Tinc, IG, TG, Terres Rares, and Thann entered into agreements (Exs. J to J'4, inclusive, which are uncanceled). KK was to own 50% of a new company, and of the remaining 50% Terres Rares 30% and Tinc 70%. IG was to have an option on one-half of Tinc's shares. TK was the new company created as a result of these contracts for the exclusive purpose of engaging in the titanium pigment business in the Japanese Empire, TK was assigned the Japanese Empire as its territory and the rest of the world was assigned through Doitsu, as trustee, to Tinc, IG and Terres Rares. TK was granted an exclusive license for its territory to manufacture and sell titanium pigments and compounds under all Doitsu's then owned or thereafter acquired patents, processes, and subject matter relating in any way to the manufacture of or use of titanium pigments and compounds, as defined within the limits of the licensed field in said contracts; that is, all methods, processes and apparatus in the field of manufacture of all titanium compounds, containing two per cent (2%) or more of the element titanium in a chemically, mechanically or physically combined state and mixtures thereof, which can be used as pigments, whether or not adapted for other uses and all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses. TK granted Doitsu, as trustee for Tinc, IG, TG and Thann a similar exclusive license of its present and future titanium pigment patents.

processes and subject matter relating in any way to the manufacture or use of titanium pigments or compounds, as defined within the limits of the licensed field in said contract. TK and Doitsu each agreed not to import titanium pigments and compounds into the territory of the other without the consent of the other and agreed to impose the same obligations upon its customers. TK and Doitsu agreed not to import into the territory of the other finished articles manufactured by it and agreed to prevent such importation by customers purchasing titanium pigments or compounds from it if the importation of such finished articles interfered with the sales of titanium pigments by the other party in its own territory. TK was prohibited from granting sublicenses. Doitsu was permitted to grant sublicenses under any patents licensed to it by TK provided the sublicensee of Doitsu agreed to grant to TK for its territory an exclusive license under all present and future patents of the licensee or sublicensee relating to the manufacture and sale of titanium pigments and compounds, and provided Doitsu required the licensee or sublicensee to agree to respect the exclusive territory of TK and to assume the same obligations with respect to TK's territory as were imposed on Doitsu. TK was given an option on Blumenfeld's Japanese patents in exchange for certain rights to be given Terres Rares and Thann. The contract Exhibit J-1 is to run until 1960 and has not been cancelled by the parties. TG supplied the Japanese market with titanium pigments until the Japanese factory commenced production.

55. Contract Exhibit A allocated the Canadian and North American markets to NL as part of its exclusive territory.

56. NL owned certain Canadian patents and, by virtue of the 1920 agreement, had an exclusive license and the right to grant sublicenses under TAS's Canadian patents. Prior to the year 1934 Laporte was interested in erecting a factory in Canada to manufacture titanium pigments. NL and DP were selling titanium pigments and compounds in the Canadian market at this time. DP had contractual relations with CIL conferring certain rights and imposing certain obligations upon CIL with respect to patents and processes. NL and CIL entered upon negotiations which resulted in the making of four contracts (Pl. Exs. K to K-3, inclusive, which are uncanceled). DP and ICI had knowledge of such negotiations. There is no direct evidence that DP either approved or disapproved these contracts. I infer that it acquiesced in them.

(a) There was an agreement between CIL and NL dated January 1, 1937, under which a new company, CTP was granted the sole right to manufacture and sell under CIL's and NL's titanium patents in Canada and Newfoundland. CTP was to be owned 49% by NL and 51% by CIL. In addition, NL was to receive 8000 shares of non-voting (except under certain conditions) \$100 par value stock in consideration of its existing good will, patents and technical information. NL and CIL agreed to subscribe to bonds of CTP for the purpose of erecting a factory; but because of World War II the bonds have not been issued and the factory has not been built. CTP was to have six directors, three nominated by NL and three by CIL; one of the CIL directors was to be president. Until the factory was built NL agreed to supply CTP at cost plus 10% and to use its best efforts to enable CTP to purchase from BTP at cost plus 10%. The agreement was to remain in force for thirty

years, and thereafter could be terminated on twelve months' notice by either party. If at the end of thirty years either party wished to withdraw from the agreement, it was required to offer its shares to the other party at book value. (In determining book value good will, patents, and future earnings were not to be considered.) CTP was to confine its activities relating to the manufacture and sale of titanium pigments and compounds to Canada as its exclusive territory. NL agreed to conduct all of its operations relating to the manufacture and sale of titanium pigments and compounds in Canada through CTP and CIL agreed that it would not conduct any such operations anywhere in the world except through CTP.

(b) CIL agreed to grant an exclusive license, throughout the world, to CTP under all its then owned or thereafter acquired patents, processes and subject matter, relating to the manufacture or use of titanium pigments or compounds.

(c) NL agreed to transfer its Canadian titanium pigment business to CTP.

(d) NL entered into contract Exhibit K-1 with CTP and granted to CTP, for Canada, an exclusive license on all of NL's patents, then owned or thereafter acquired, processes and subject matter relating to the manufacture or use of titanium pigments or compounds. NL was allocated the rest of the world as its territory. CTP granted to NL an exclusive license for the world outside of Canada, in respect of then owned or thereafter acquired patents, processes and subject matter relating to the manufacture, sale and use of titanium pigments, provided that NL was to grant to DP a non-exclusive license for North and South America under

any such patents licensed to NL by CTP. NL and CTP agreed not to export titanium pigments or compounds into the territory of the other without the consent of the other party and agreed to impose the same obligation upon its customers. NL agreed not to export into CTP's territory any finished articles manufactured by NL, and CTP made the correlated agreement. No such restriction was put upon their customers. CTP could grant sublicenses but neither party could grant licenses under its own patents or under any patents licensed to it under Exhibit K-1, (except NL to DP) unless the licensee agreed to grant to the other party to the contract (NL or CTP) an exclusive license under all its present and future patents relating to the manufacture or use of titanium pigments or compounds for the territory of such other party (CTP or NL) and unless such licensor (CTP or NL) compelled the licensee or sublicensee to agree to respect the territory allocated to the parties to the contract (CTP or NL) in Exhibit K-1 with respect to each other's territory. The contract is to run until 1967.

57. In 1935 NL agreed with CIL, BTP and Laporte to maintain prices on American titanium pigments sold by NL in Canada, above the prices charged for titanium pigments manufactured by BTP or Laporte and sold by BTP and Laporte in the Canadian market. This facilitated a price agreement between BTP and Laporte for the British Empire market outside of Canada. There is no evidence as to how long this agreement endured.

58. CTP acquired all of the titanium pigment business of Laporte in Canada in 1937 and said Laporte agreed to

refrain from engaging in the titanium pigment business in Canada until 1952.

BTP (with consent of NL), NL and DP severally supplied the Canadian market until 1939. Since 1939 CTP has acquired its products from DP and NL and will continue to do so until it builds a factory. DP sold its titanium pigment products in Canada prior to the creation of CTP to CIL and since the creation of CTP entirely to CTP. Negotiations are in progress among NL, CIL and CTP to revise the Canadian agreements on lines similar to the revised British agreements.

59. The defendants NL and TINC and their foreign associates, SIT, TG, BTP and TK, agreed in 1939 that, should patents relating to the titanium pigment business but outside the license field be offered by one of the parties to the other, the offer would be subject to the terms and conditions defined in the various contracts under the license field. NL and CTP agreed to extend their obligations to exchange patents, present and future, which in any way related to the titanium pigment business and to other matters, outside the license field on a reciprocal basis.

60. Each and every patent application of NL and NL's foreign associates SIT, TG, BTP, TK, CTP, which related to the licensed field as defined in the various agreements, was immediately available to each other on an exclusive, royalty-free basis under their respective agreements for the respective territories in which the companies operated throughout the world. The expenses of filing and securing said applications and patents were shared equally by the exclusive licensee in whose territory the application was filed and the patent owner.

61. After the outbreak of the present war in 1939 NL, Tinc, and TG believed that if the United States should be at war with Germany and as a consequence the United States Alien Property Custodian should seize the United States patents owned by TG and the German equivalent of the Alien Property Custodian should seize the German patents owned by Tinc and that if such patents were licensed to outsiders there might be competition in the respective markets allocated to the parties to Agreements A and C. NL, Tinc, IG, and TG in order to prevent such potential competition decided that all of the United States patents owned by TG should be transferred to Tinc and the Tinc patents in the exclusive territory of TG as defined in Exhibit C-3 should be transferred to TG provided that none of the other provisions of the several contracts were to be affected in any way. Thereupon TG assigned to Tinc some of its United States patents and applications and Tinc endeavored to transfer all of its German patents and other patents in TG's territory to TG.

62. Defendants NL and Tinc and their foreign associates TG, BTP and TK exchanged complete technical information which in any way related to the manufacture or use of titanium pigments or compounds as defined within the limits of the licensed field in their various agreements. Such information was of inestimable value in developing the business of these associated companies to the exclusion of potential newcomers in competition in the industry.

63. The defendants NL and Tinc and their foreign associates TG, BTP and SIT exchanged full and complete information relating to the sales prices of titanium pig-

ments and the activities of any other companies and potential competitors engaged in the titanium business in any of the markets of the world. Prices for the various markets in Europe were frequently fixed for all titanium pigments below which none of these associated companies was to sell in its respective markets without immediate notice to Tinc.

64. Each and all of the various contracts (Exs. A to A-2 inclusive, B, C to C-8, inclusive, F to F-6, inclusive, J to J-4, inclusive, and K to K-4, inclusive) has had the intended effect of (1) preventing competition among the various parties to said contracts within the exclusive territories allocated to the parties in their respective contracts; (2) creating a world-wide patent pool of many of the patents of commercial value relating to the manufacture of titanium pigments and compounds within the licensed field, as defined in said agreements in which said patents are made available only to the parties to said contracts; (3) creating a world-wide pool of useful technical information, relating to the manufacture and use of titanium pigments, available only to any of the parties to said contracts within their respective exclusive territories; (4) enabling the parties to said contracts outside the United States to facilitate the control of production and prices of all titanium pigments and compounds produced within their respective exclusive territories; (5) completely preventing any patent litigation among the parties (there has been no patent litigation in the titanium pigment field anywhere in the world); and (6) accelerating the spread of improvement in the product and processes throughout the world.

It is a fact, but I am unable to find whether or not it has a causal relationship to these contracts, that production

of titanium pigments has increased both in the United States and abroad [NL alone increased production from a nominal 500-1000 tons in 1920 to 76,788 tons, in terms of TiO_2 content, in 1944 and increased its sales so that in 1943 its sales of titanium pigment exceeded sales in the U. S. of lithopone, zinc oxide and white lead by all producers] and that the price has declined from 40¢ a lb. in 1927 to 14½¢ in 1944.

65. Joseph Blumenfeld, a chemist and managing director of Terres Rares, a French company in which he owned stock, in or about 1922 obtained certain patents relating to the manufacture of titanium compounds which he assigned to Terres Rares. Between 1922 and 1933 Terres Rares granted exclusive licenses to Thann, a French company, for France, its colonies, dependencies, protectorates, and mandated territories; to Montecatini, the largest chemical company in Italy, for Italy, and non-exclusive licenses for Belgium, Holland, Switzerland, Spain, Portugal, and South America, subject to rescission on three months' notice; to Aussig, the largest chemical company in Central Europe, for Czechoslovakia, Austria, Hungary, Yugoslavia, Rumania, and, subject to certain obligations, Danzig and Denmark, and non-exclusive licenses for Poland and Russia; and to Laporte for the British Empire. These were the only companies other than TG producing titanium pigments in Europe in 1933. These companies in 1933 were in competition with TG and BTP in the markets allocated to them by contracts Exhibits B, C, F.

66. Jebsen, acting for Tinc, either made or approved agreements among the European producers of titanium as follows:

(a) On November 23, 1933, Aussig and TG entered into an agreement, Ex. G, which established a sales quota of approximately 25% for Aussig and 75% for TG in Germany, Czechoslovakia, Poland, Austria, Hungary, Yugoslavia, Rumania, and Russia. Prices were to be fixed by mutual consent, and were not required to be identical, so that each firm could compete with dealers in other pigments (lithopone, zinc oxide, white lead, etc.) as local conditions might permit. Each gave the other the right to use its product patents, royalty-free, and agreed to support the other in protecting these rights, and to refrain from giving any technical information or aid to potential competitors; and the parties contemplated an agreement on process patents and experience. Aussig agreed to buy from TG at preferential prices any requirements of titanium pigments, above Aussig's then production capacity, which Aussig might need to meet its quota. Said contract was in effect from July 1, 1933; and there is no evidence that it has been cancelled and the effect of the war on its operation is undetermined.

(b) In June, 1935, but to take effect as of May 1, 1934, an agreement known as the Contrat a Quatre (Ex. G-1), was made between Thann and Terres Rares, on the one hand, and SIT and Tinc, on the other, which established a quota of 30% for Thann and Terres Rares and 70% for SIT and Tinc in Belgium, Holland, and "various countries" (Estonia, Latvia, Lithuania, Abyssinia, Liberia, Arabia, Afghanistan, Persia, and Siam) and a 50% quota for each group in France; prices for these territories were to be fixed by mutual consent; product patents of each party were to be made available to the other parties royalty free.

All parties were to refrain from giving any technical information or aid to potential competitors. No new factories were to be built in the countries of the agreement outside France without the mutual consent of all parties. This agreement could be terminated by a change of sales possibilities resulting from governmental measures, from "new competition", or from "any governmental or legislative measures making it partly or wholly illegal". Otherwise it could not be terminated before December 31, 1938, and then only on six months' notice. There is no evidence that such notice was ever given. Thereafter it was to continue for two-year periods unless notice was given six months before the expiration of any such period. This agreement was related to the Contrat a Six (see below) and could be terminated on three month's notice if that agreement was terminated. There is no evidence that Contrat a Quatre was ever cancelled.

(c) At the same time, in June, 1935, an agreement known as the Contrat de Livraisons (agreement concerning mutual deliveries) was made between the same parties and provided that each group would supply the other with any titanium pigments which it might have available after its own needs were satisfied, at certain fixed prices and on certain terms. It was agreed that goods delivered by one group to the other could not be reexported and that this obligation must be imposed on the customers of the parties.

(d) An agreement known as the Contrat a Six, Ex. G-3, was also entered into at this time by Thann, Terres Rares, Montecatini, Tinc, SIT, and TG, in which territories were allocated and sales allotted on a quota basis, retroactive to May 1, 1934, thus: TG and Aussig were recog-

nized as enjoying exclusive rights of sale and delivery in Germany, Danzig, Czechoslovakia, and Russia; TG, Terres Rares, and Thann in Spain, Portugal, Japan, Switzerland, Bulgaria, Greece, Turkey, China, and South America (subject to TP's rights in South America); Terres Rares, Thann, and SIT in France; Terres Rares, Thann, and Tinc in Belgium, Holland, and "various countries" (as defined above); Montecatini in Italy; Tinc in Norway, Sweden, and Finland; and Tinc and Aussig in Denmark. Each party agreed to respect the others' exclusive rights. Each of the parties to contract Exhibit G-3 agreed to assist each other in preventing third parties from entering the titanium pigment business within their respective territories, and each of the parties to contract Exhibit G-3 agreed not to reexport titanium pigments or products from the territories from which they had been ordered and delivered. Sales prices were to be fixed by mutual agreement. Use patent rights were exchanged between the parties on a royalty-free basis. Said contract Exhibit G-3 was in effect until December 31, 1938, when it was cancelled by Montecatini. The intention to continue to cooperate was expressed by the parties to contract Exhibit G-3 after its cancellation.

67. BTP entered into a price agreement with Laporte, in 1934, covering the sale of titanium pigments for the British Empire. Said price agreement is still in effect but has no application to the Canadian market from which Laporte withdrew in 1937. In 1941 BTP and Laporte entered into a quota agreement whereby a quota (Pl. Ex. F-8) of the titanium pigment business in the British market was allocated to each of the said parties. This agree-

ment is uncanceled. Laporte is obligated, by agreement with Blumenfeld, to refrain from exporting titanium pigments to any territory outside of the British Empire and has refrained from making such exports outside the British Empire since 1937.

68. Each and all of the said contracts, Exhibits G, G-1, G-2, G-3, F-8, has, and have had the intended effect of helping Tinc and NL to prevent any exports of titanium pigments or compounds to the United States.

69. Defendants NL and Tinc and TG, represented by Jebesen, McCarty and Kuhne, commenced negotiations with CP and the other Blumenfeld companies represented by Blumenfeld, Ticknor, Chase and Burton, to eliminate competition and also to facilitate exchange of technical information and patent rights between the two groups producing titanium pigments in all markets of the world in 1930. The parties believed that no agreement eliminating competition between the two groups in markets outside of the United States and to achieve the other desired ends could be reached unless the parties thereto considered themselves secure against competition from American producers. A tentative understanding had been arrived at between NL's foreign associates and the Blumenfeld interests outside the United States in March, 1931, involving both a technical and commercial cooperation consummation of which required assent of NL in some respects. The negotiators were of the opinion that the making of such an agreement would be facilitated if there were an agreement for technical cooperation between NL and CP. The agreements mentioned in Findings 66 and 67 were essentially for commercial not technical cooperation.

70. By 1931 the titanium pigment art in the United States was already developed. Patent positions were claimed by both NL and CP, the then only existing manufacturers. DP's efforts initiated prior to that time to develop, through research, an independent patent process were still unsuccessful and substantial additional expenditures and time would have been required to complete the program and DP became convinced that if it were to enter the manufacture and sale of titanium pigments as a development of its white pigment business it would be necessary to get into the business as promptly as possible through the acquisition of the patents and the going business of CP.

71. After the purchase of CP by Krebs in July, 1931, defendant NL represented by Jebson, McCarty, Thompson and Beschorman; and Ticknor and Chase, directors of Krebs until the end of 1934 (the latter two without authority from DP), continued negotiations to reach a worldwide agreement which would eliminate competition in the manufacture of titanium pigments and compounds. Blumenfeld continued to represent the Blumenfeld group exclusive of Krebs. The parties to these negotiations continued to seek means whereby the European producers could be secure against competition by DP or Krebs.

72. DP knew of plans to combine all the European titanium producers and was willing to give its aid to NL in bringing about a patent exchange among the European producers in order to secure one in the United States with NL. NL wished to pool with DP all their patents and technical information relating to the manufacture or use of titanium pigments in the United States in order to settle

its patent controversies with DP and to obtain access to DP's patents and technical facilities and jointly to control and dominate the manufacture and sale of titanium pigments and compounds; and DP had knowledge of this wish. NL had threatened but failed to file suit on any claims it may have had for any alleged infringements of patents owned or controlled by it against CP prior to July 1, 1931. The defendant DP knew at the time it acquired the business of CP in July, 1931, that NL had failed to enforce any claim it might have against CP for any alleged infringement of any patents relating to the manufacture and sale of titanium pigments or compounds which were owned and controlled by TP. Both NL and DP in good faith claimed that each infringed certain of the other's titanium pigment patents and both in good faith denied such infringement claiming, among other things, that the patents alleged to be infringed were of doubtful validity. NL and DP agreed in October, 1932, that the validity of the patents claimed to be infringed should not be questioned except as a last resort and that they should try to arrive at a general understanding. NL advised DP of its contracts with TAS in May of 1932 and of the restricted nature of said license agreements. TP did not own the legal title to 7 of the 9 patents it claimed were infringed by Krebs in 1932; but it held licenses thereunder with the right to grant sub-licenses thereunder subject to the contract of 1920. Krebs did not check the legal title to the patents NL alleged it infringed because it considered that under the agreement with NL (Ex. E) it was obtaining rights under all patents involved in the discussions of patent infringement between it and NL. Both TP and Krebs began to

exchange extensively technical information relating to the manufacture and use of titanium pigments in 1932 and the information so exchanged related to much more than any alleged claims of patent infringement by either company. Blumenfeld and his foreign associates furnished technical aid and assistance to Krebs at its instance from August 1931 until the approximate date at which TP and Krebs commenced the exchange of technical information in 1932. Krebs did not unequivocally notify Blumenfeld of its position that it intended to make no agreement with Blumenfeld or Terres Rares for exchange of patents or information until after contract Exhibit E had been approved by NL's foreign associates and executed by TP and Krebs. Krebs never exchanged patent or patent applications with Blumenfeld and did not furnish Blumenfeld with any technical information.

73. In 1933 TP and Krebs were the only producers of titanium pigments in the United States.

Contract Exhibit A by its terms prevented TP from entering into a contract with Krebs unless Krebs subscribed to the provisions of Article 14 of Contract Exhibit A and particularly unless Krebs agreed not to export into the territories of NL's foreign associates and unless Krebs agreed to grant exclusive licenses to NL's foreign associates under all its present and future patents for titanium pigments and compounds in the territories of the foreign associates.

After extensive negotiation NL and DP formulated an agreement in writing later executed on August 28, 1933, and dated as of January 1, 1933, which is in evidence as Exhibit E. The agreement Exhibit E provided:

1. The parties were TP and Krebs.

2. The licensed field was defined as

"(1) All methods, processes and apparatus in the field of manufacture and use of all titanium compounds, containing two per cent (2%) or more of the element titanium in a chemically, mechanically or physically combined state, and mixtures thereof, which can be used as pigments, whether or not adapted for other uses, and (2) all such titanium compounds and mixtures which can be used as pigments, whether or not adapted for other uses".

3. TP granted Krebs (a) a non-exclusive license to use within the United States, its colonies and possessions, and for the licensed field, all processes and apparatus of manufacture, patented or not, which it then used or thereafter used during the term of the agreement, and as to which it was free to grant such license; (b) a non-exclusive license to exploit within the same territory and for the licensed field all U. S. patents then or thereafter owned by it during the term of the agreement; and (c) a non-exclusive license to sell the products resulting from such processes in the U. S., its colonies and possession, Mexico, Central America, West Indies and South America.

4. Krebs granted the identical rights to TP.

5. Both parties agreed to exchange technical information including patent applications and the aims and results of their research and development work.

6. Each party agreed to help the other obtain a non-exclusive license for the mentioned territory under any U. S. patent under which the other was licensed.

7. Krebs agreed to give TP's foreign associates the first opportunity to acquire from Krebs a non-exclusive license under any patent issued in Europe or Great Britain within the license field, at the disposal of Krebs.

8. The contract was subject to cancellation after December 31, 1933, on three years' notice.

9. The parties released each other from claims for infringement of the U. S. patents then owned or thereafter during the term of the agreement acquired with right to sue for past infringement. Each of the parties also released the customers of the other from past infringement claims.

10. Mutual royalties which could not exceed a total of \$40,000 by either party were provided for and no royalties were to be paid by either party after 1936. (And such royalties were paid).

TG objected to this proposed agreement upon the grounds that it failed to provide that Krebs (a) shall not manufacture in TG's territory; (b) shall not sell in TG's territory; (c) shall require its customers not to sell in TG's territory; (d) shall not grant sub-licenses except to enterprises outside TG's territory and for use outside TG's territory; (e) shall not exchange experience except with the same limitations,

"as otherwise the unbearable situation may arise for the T.G. that Krebs competed with T.G. in the latter's territory, with T.G.'s own patent rights and experiences which are transmitted to Krebs through T.P."

In an effort to overcome this obstacle to the making of the agreement of Exhibit E, C. H. Rupprecht, President of Krebs, now deceased, had conversations with W. C. Beschorman, Executive Vice-President of NL.

Rupprecht told Beschorman to make IG realize that they (IG and TG) were putting their interests in NL's hands and that they would be well taken care of; that the anti-trust laws made impossible the incorporation into the agreement of such provisions as IG desired. He also pointed out (a) that the license granted by Exhibit E contained a territorial limitation which excluded TG's territory from the scope of the license; (b) that DP was not then interested in the business of exporting to TG's territory or of manufacturing in TG's territory; (c) that DP had a general policy of not granting licenses which were exclusive as to DP.

In order to assist further in persuading IG to withdraw its objections, Krebs, on June 28, 1933, delivered a letter, drafted by its counsel, to NL for transmittal to IG. In that letter (Pl. Ex. 267)* DP (1) expressed its desire

*
Blind copies to

E. C. Thompson—Cleveland

Wm. Richter — Wil.

T. R. Hanley — "

June 28, 1933

CONFIDENTIAL

W. C. Beschorman, Vice Pres.,
National Lead Company,
111 Broadway,
New York City, New York.

Dear Mr. Beschorman:—

We have considered the various points raised by I. G. in their cable to you with the desire, if possible, to comply with ~~the~~ request.

to comply with IG's request if possible; (2) stated that the antitrust laws prevented DP from making any commitments respecting the territories of TG and Tinc; (3) called attention to the territorial limitation in the proposed license agreements and stated that with such limitation, "we think the result will be eminently satisfactory to your foreign associates"; (4) stated that legally and practically there was

As you are aware, the Anti-Trust Laws of this country definitely prevent this Corporation from making any commitments respecting the territories of Titangesellschaft and Titan. Inc. Further, these several companies are not parties to the Krebs-Titanium Pigment Agreement and so, as to them, we are unable to make any direct commitment. However, since Article II of the Krebs-Titanium Pigment Agreement definitely provides that Krebs is limited both in respect to use and sale to the territories set forth in this Article, we think the result will be eminently satisfactory to your foreign associates. As to controlling the disposition of our products by our customers, we are sure you appreciate the difficulty both from a legal and practical standpoint.

The I.G. request that Krebs grant no sub-licenses or technical aid to others in the territories of the foreign companies, is tantamount to obligating Krebs to grant exclusive licenses. The whole agreement, you will recall, for definite reasons, was placed on a non-exclusive basis. Since all licenses received by Krebs under its foreign patents, are subject to negotiation, we believe there will be no difficulty in working out a solution that will be acceptable to all parties; it may well be that such negotiations will result in exclusive licenses to your foreign associates. Naturally, we shall treat technical information in the same manner as our patents.

The present form of our Agreement is the result of much care and thought on the part of both parties. It embodies, as we see it, a practicable working basis for both companies, as well as for your foreign associates.

Very truly yours,

CHR:s

President

great difficulty in controlling its customers in the disposition of its products; (5) refused to bind itself not to license others than TG in TG's territory; but expressed the belief that in the prospective negotiations for any foreign patents owned by DP a solution would be worked out which would be "acceptable to all parties; it may well be that such negotiations will result in exclusive licenses to your foreign associates", and that exchange of experience would be treated in the same manner as patents.

On July 21, 1933, after further conversations between Rupprecht and Beschorman and also between Rupprecht and Jebesen, Beschorman sent a letter dated July 12, 1933, transmitting the Krebs letter of June 28th. In his letter of July 12th (Pl. Ex. 273)* Beschorman wrote (1) experience

July 12, 1933.

I. G. Farbenindustrie
Aktiengesellschaft
Frankfurt (Main)
Grüneburgplatz

Dear Sirs:

Immediately upon receipt of cablegram of June 22nd from Dr. Jebesen, copy of which is attached, we took the matter up with the Krebs Pigment & Color Corporation, submitting to them a copy of the cable, and take pleasure in handing you copy of their reply under date of June 28th. Careful reading of the Krebs letter will surely indicate to you the spirit in which they are entering into this contract and their efforts to meet your views. We feel that experience will prove that such will be the case.

In regard to the phrase "non-exclusive license" to which you call our attention as occurring in Article 5, Paragraph 2, we have to refer to the United States Anti-Trust Laws which absolutely forbid the granting of exclusive license between two manufacturers in the United States as such a practice would tend to create a monopoly. Therefore, the use of this phrase, "non-exclusive license" is simply to comply with the United States Laws

will prove that Krebs is trying to meet your views; (2) the use of the phrase "non exclusive license" in Article V of

and in practice the licenses under each other's patents will undoubtedly prove to be, to all intents and purposes, exclusive.

Referring subsequently to the points brought out in your letter of June 20th, under A, B, C, D and E, you will note that the Krebs Company consider themselves limited both as to use, manufacture and selling to the territory granted to them by the agreement. While this agreement does not specifically prevent Krebs from exporting into your territory any products not manufactured under the patents of the Titanium Pigment Company and its associated companies, it will be a difficult matter to discriminate between such manufacture and manufacture under their patents and maintain close and good co-operation, and the practical effect will be that Krebs will refrain from such export.

As to exports by clients of the Krebs Company, we note that Krebs will use all their efforts to prevent any export outside of their territory which would cause any trouble to you in any way.

In regard to licenses, although non-exclusive licenses are specified throughout the agreement, you will note from the letter of Krebs Company that they are not adverse to granting exclusive licences in case this may be found desirable by you. Under the practice, as we foresee it, these licenses will be given against a nominal payment except in cases of outstanding development.

We also see your point, that by the exclusive license you have given Titan Co. Inc., which has granted exclusive licenses to the Titanium Pigment Co. Inc., you are not in position to trade with Krebs regarding any American patents belonging to you. However, you may rest assured that your interest in these respects, which are also our own interests in view of our part ownership in the Titangesellschaft, will be fully and completely looked after.

At one time we considered the question of an agreement between the Titangesellschaft and Krebs covering the points in your letter, but have dropped this idea as we felt that you would be better served to have us look after your interests than to complicate the situation with a separate contract.

The only other point in your letter which we do not believe has been covered is your suggestion that the contract be changed from termination in three years to termination in five years. Frankly, there is no possibility of the contract being terminated at any time that we can foresee, and I am glad that you did not make any especial point of this either in the cable or in your letter of June 20th.

the Agreement is simply to comply with the anti-trust laws and in practice the licenses will prove to be, to all intents and purposes, exclusive; (3) while the agreement does not specifically prevent Krebs from exporting into TG's territory products not manufactured under TP patents, it will be difficult to discriminate between such manufacture and manufacture under their own patents and maintain close and good cooperation, and the practical effect will be that Krebs will refrain from such export; (4) Krebs will use its efforts to prevent export by its customers; (5) NL will look after your interest in these respects—a method preferable to making a direct contract between Krebs and TG.

A copy of Beschorman's letter of July 12th was, before it was sent to IG, shown to Rupprecht and on July 17, 1933, a copy was sent to him for Krebs' records.

There is no evidence that Rupprecht remonstrated against the sending of Beschorman's letter to IG. Krebs and DP through Rupprecht acquiesced in and ratified the assurance made by Beschorman to IG as to territorial delimitations of the titanium pigment business. In acquiescing in such assurance that DP would not manufacture in or sell in TG's territory, DP was not making a promise; it

May I add that we certainly appreciate your attitude and the views you have put forward in your letter to Dr. Jebesen and trust that you will not be disappointed in the future by following the lines we have suggested. May we ask for further advice from you as to whether the Krebs letter and above make the whole matter satisfactory.

Very truly yours

Executive Vice President.

Copy to—Dr. Kuhne

Dr. Jebesen

Mr. Rupprecht

Mr. Tasker, Vice Chairman, British T.P.Co.

was doing no more than giving expression to its then existing policy not to manufacture or sell in Germany and other TG territory. DP's aforesaid assurance in part formed the consideration for continued abstinence of the European producers from exporting to the United States.

IG construed the communications to mean that Krebs "will loyally respect the territorial delimitations as regards manufacture, granting of licenses and sale, which are fixed in the agreement" between Tinc and TG; and in reliance thereon, withdrew its objections to the agreement Exhibit E. There is no evidence that the aforesaid construction was communicated to DP.

DP did not agree with TP or NL that it would refrain from exporting titanium pigments into TG's territory; but it assured TP and NL that, as a practical matter, such exports would not take place.

DP did not agree with TP or NL that it would grant NL's foreign associates exclusive licenses under DP's foreign patents; but it gave assurances that the practical effect of its conduct would produce substantially identical results as if it did so agree.

Tinc and NL's other foreign associates approved the agreement between TP and Krebs on the basis of the DP assurances.

NL agreed with DP that all of NL's titanium pigment business would be done exclusively through TP, and DP agreed with NL that it would only engage in the titanium pigment business through Krebs. The conduct of DP of its titanium business after January 1, 1936, through the Krebs Division of DP did not breach or violate this agreement or any assurance previously given by DP through Krebs.

DP, through Rupprecht and Krebs, by these assurances and Exhibit E, joined the conspiracy found herein to exist between, NL and its foreign associates. DP's status rights and obligations were different from those of the other members of the combination. DP did not thereafter withdraw.

In July, 1933, Blumenfeld conferred with Rupprecht, President of Krebs, and the former requested Krebs to agree not to export into the territory of the European producers so as to facilitate the making of an agreement for commercial cooperation among the European producers. Rupprecht stated that he would make no such agreement but he explained to Blumenfeld that DP was not interested in the export business.

Neither Krebs nor DP exported any titanium pigments to the territory of TG, BTP, SIT, TK, Terres Rares, Thann, Aussig or Montecatini.

In 1936, DP received an order from BTP for 50 pounds of titanium pigment. Rupprecht telephoned the President of NL and advised that he was sending the requested merchandise as a free sample, "not wanting to have any question raised about * * * selling outside the United States".

74. Blumenfeld's foreign associates, Terres Rares, Aussig, Thann and Montecatini imported no titanium pigments or compounds into the United States.

75. DP and NL exchanged technical information relating in any manner to the manufacturing or use of titanium pigments or compounds from about April, 1932, until April, 1940.

As of about May 1, 1940, the exchange of technical information between NL and DP was discontinued; and the

1933 agreement between TP and Krebs, which had been assumed by NL and DP, respectively, was, by an agreement between NL and DP dated January 1, 1941, (Ex. E-3) amended to eliminate provisions for exchange of technical information.

76. The aforesaid agreement, Ex. E, was further amended to include extender pigments, theretofore included by implication and practice. The agreement, Ex. E, as thus amended has not been terminated.

77. From August, 1933, to January 1, 1941, all patents and patent applications owned or filed by TP, NL, Krebs or DP which in any way related to titanium pigments or compounds within the licensed field of contract Exhibit E, were immediately available to each other on acquisition or filing. From and after January 1, 1941, all United States patent applications of either NL or DP were made available and still are available for the use of the other company after six months from the date of the filing of applications. All United States patents issued to or acquired by either DP or NL within the licensed field from and after January 1, 1941, continued to be and still are available to either company on a royalty-free basis immediately on issue or acquisition.

78. From 1933 on there was active competition between NL and DP for customers. There has been a vast increase in sales; and repeated reductions in the price of titanium pigments have taken place and a very few increases. DP entered the titanium pigment business in 1931 and since that date it has made frequent plant expansions for the manufacture of pure and composite TiO_2 .

and its production increased from 20,027 tons in 1935 to 50,674 tons in 1941 and then decreased to 42,843 tons in 1943. ✓

NL and DP have endeavored to match each other's titanium products; but each also manufactures certain titanium pigments having special applications not manufactured by the other.

There is no allocation of territory or customers between NL and DP; and each maintains a large, highly trained technical sales force engaged in endeavoring to sell titanium pigments. To a very large extent the salesmen of the two companies are chemists whose contact with consumers (that is, manufacturers of paint, rubber, glass, etc.) consists in endeavoring to demonstrate that their products merit acceptance on the basis of technical superiority. The buyers of titanium pigments are mainly well-informed, experienced purchasing agents. NL and DP sell for identical prices; there is no evidence that such price identity is the product of agreement or collusion.

•79. In entering into the agreement, Ex. E, NL had several purposes:

- 1) For about a year prior to the making of Ex. E officials of NL had been concerned by the early expiration dates of many of the patents upon which NL relied. By exchanging patents and technology with DP, a large and powerful corporation, possessed of great research facilities, NL expected to strengthen the patent monopoly of NL and DP jointly, as against newcomers in the titanium pigment business.

- 2) NL intended by its agreement with DP to avoid the expense and the risks of patent litigation and to obtain

access to the Blumenfeld patents and DP's research capacity.

3) NL expected to obtain the benefits of a friendly and cooperative competitor rather than that of a hostile competitor.

4) From the assurances given by DP on the request of IG, NL expected to obtain freedom from interference by DP in the arrangement made with the European producers.

DP's purposes in entering into the agreement Ex. E were:

- 1) To avoid the expense and risks of patent litigation.
- 2) To avoid the research expense in trying to avoid infringement of NL valid patents.
- 3) To obtain access to NL's technical experience and patents in the titanium pigment field as well as the patents and the experience of NL's foreign associates.
- 4) To strengthen its own patent position in the titanium pigment field to the exclusion of others than NL by pooling its patents with NL.

The necessary effects of the agreement Ex. E. and of DP assurances have been

- 1) The achievement of NL purposes.
- 2) The achievement of DP's purposes.
- 3) To give NL and DP together domination and control over the titanium pigment business in the U. S.

4) To remove obstacles from the execution of the TG-Aussig agreement—Ex. G, the Blumenfeld agreements G-1, G-2, G-3, the Japanese agreement Ex. J, the Canadian agreement Ex. K and the price agreement between BTP and Laporte for the British Empire.

5) A proliferation of patents.

6) To restrict and obstruct exports from the U. S. outside of Western Hemisphere.

7) To restrict and obstruct imports into the U. S.

8) To settle the existing and potential patent disputes and to promote the more rapid development of the titanium business and a greater freedom of action for the parties under titanium pigment patents and developments.

80. In 1934 defendants NL and DP jointly purchased the Leuchs patent relating to the manufacture of titanium pigments each contributing one-half of the cost. Shortly thereafter DP acquired NL's half interest and granted NL a non-exclusive license thereunder royalty free. At time of purchase NL's technical director advised that in his opinion the patent was invalid but he thought it might anticipate a Blumenfeld patent. The patent was reissued with broader claims. Said patent was never used by either DP or NL. The patent was included among those licensed to VC and Zirconium.

81. In 1939 National Lead undertook to adapt a patented machine known as the Micronizer Reduction Mill for use in the manufacture of titanium pigments. Following developments and changes by NL, the machine proved of substantial value as a means of improving the texture of

titanium pigments; and NL secured an exclusive license (Ex. P), with the right to grant sublicenses, for titanium pigments manufacture, from the patentee, International Pulverizing Corporation. NL granted DP pursuant to Ex. E the non-exclusive right to use this apparatus on the same terms and conditions as those granted to NL under its exclusive license from International Pulverizing Corporation. The license from NL to DP was granted at about the same time NL secured an exclusive license from International Pulverizing Corporation to use this apparatus. DP regarded this apparatus essential to enable it to make a pigment comparable to one produced by NL, which was using the apparatus. At its request Zirconium was granted by NL the right to use this apparatus about eighteen months later on the same terms and conditions as DP. NL refused a license of the "Micronizing Apparatus" to VC and Sherwin-Williams Company, who also desired to use this apparatus. In October, 1944, NL relinquished its exclusive license and took a non-exclusive license.

82. DP's method of doing business was to sell titanium pigments to manufacturing consumers. The form of sales contract used by DP contained the phrase "for the buyer's own consumption." The evidence does not establish that this phrase was used pursuant to any agreement with NL, rather than that it was used to express a usual term of a requirements contract.

NL's form of sales contract in 1939, 1940, 1941 and 1942 contained an identical clause.

There is evidence that such a clause is common in the chemical industry and that DP had employed it before the 1933 contract.

83. The only licenses granted by DP of any of its titanium pigment patents were the licenses described herein. No other company or person ever requested such a license from DP.

84. Early in 1934 Zirconium, which was owned by Glidden Company and by Metal and Thermit Corporation in equal shares, began to manufacture titanium dioxide. It owned some patents relating to such manufacture which it had acquired from its parent corporations. On January 8, 1934, DP notified Zirconium that such manufacture might infringe patents owned by DP. Negotiations ensued which resulted in a license agreement from DP to Zirconium dated January 1, 1935, and signed on August 19, 1935, Ex. I. Thereby DP granted Zirconium a non-exclusive license under specified patents, for the life of the patents, subject to the payment of a royalty on all TiO_2 produced and subject to a limitation on tonnage of 3,000 tons in 1935, to 9,000 in 1944 and thereafter, of titanium dioxide produced under the license.

On March 7, 1943, DP licensed Zirconium under additional patents without additional royalty. On November 10, 1944, the tonnage limitations were cancelled. DP has collected in royalty from Zirconium \$196,655.86 to July 1, 1944.

On May 17, 1934, NL sent a notice to Zirconium of probable infringement. Negotiations followed which resulted in an agreement dated May 6, 1935, Ex. H, whereby NL in lieu of royalties received 10% of the stock of Zirconium, had its president elected to Zirconium's Board of Directors and NL and Zirconium cross licensed each other under all patents in the titanium pigment field, then owned

or thereafter acquired, and both parties agreed to exchange technical information and experience. Zirconium assumed obligations substantially like those of Article XIV of the 1920 agreement, Ex. A, including restriction on its exports. The agreement was to endure until August 7, 1951.

NL became discontented with the management of Zirconium. Glidden and Zirconium were dissatisfied with NL's refusal to invest more money in the development of Zirconium.

In April, 1944, the agreement was cancelled, the parties exchanged releases and NL assigned its shares of Zirconium to Glidden.

Zirconium produced only pure TiO_2 . From May 6, 1935, to July 1, 1944, its total production was 33,667 tons. NL did render some engineering assistance to Zirconium in connection with the installation and use of its processes and imparted some technical information but frequently it refused to convey such technology to Zirconium on the ground that it was prevented by other agreements from so doing.

In the Spring of 1935 there was a conversation between Rupprecht for DP and Beschorman for NL respecting Zirconium's patents. The evidence does not show what the conversation was.

On occasions before 1940 there was exchange of information between DP and NL relative to Zirconium's production. The evidence does not warrant the inference that the licenses granted by DP to Zirconium and the cross licensing agreement between NL and Zirconium were made pursuant to a common plan of NL and DP or as a result of concerted action by them.

The necessary effect of the two agreements was to restrict the domestic production and foreign exports of Zirconium.

85. VC was organized in 1935 to manufacture titanium pigments in the United States.

On November 19, 1936, DP notified VC of its patent holdings in the titanium field and suggested conference. Negotiations followed and resulted in an agreement, Ex L, executed August 5, 1937.

By this agreement DP granted VC a non exclusive license under a specified list of U. S. patents subject to royalty payment on all production of TiO_2 and subject to limitation on the quantity produced under the license ranging from 3000 tons of TiO_2 content for the year 1937-8 to 9,000 tons for 1946 and any year thereafter. VC granted DP a non exclusive, royalty free license under a named patent.

In November, 1940, DP granted VC a similar license under another patent in this field for an additional royalty.

On July 22, 1943, DP granted VC a similar license under its patents for rutile pigments, without additional royalty.

In November, 1944, DP cancelled the quantity limitations in the licenses.

VC paid DP in royalties to July 1, 1944, \$193,875.24.

VC produced only pure TiO_2 . VC's total tonnage from August 5, 1937 to June 30, 1944, was 36,576 tons.

The necessary effect of this license was to restrict the production of VC.

Early in 1937 NL and VC discussed the possibility of VC infringing NL patents in the titanium field.

Extensive negotiations ensued which did not result in agreement. During these negotiations which extended over several years, VC was willing in 1938 to make an agreement for a reciprocal exchange of licenses and ex-

perience on a royalty-free basis. NL desired VC to pay a 2% royalty which VC refused. NL explained its obligations under Art. XIV of the Agreement Ex. A, and was concerned about "the manner of expressing" the obligation of VC not to compete with NL foreign associates, in view of the anti-trust laws.

In a communication to Jebson on September 13, 1938, NL adverted to this problem and stated that "in this case" a purely verbal understanding was not desirable. Mr. Jebson replied that the foreign associates would not welcome a verbal understanding, "in the present case".

NL has not instituted any action against VC to enforce its claim of infringement.

There is no evidence that the action of NL and DP with respect to VC was the result of agreement between NL and DP.

86. After the execution of Exhibit E, representatives of DP and NL's foreign associates enjoyed the privilege of visiting each other's titanium pigment plants and obtaining any and all technical information desired by either as regards plant operations and plant equipment from August, 1933, to September, 1938. This exchange was a matter of courtesy and not of agreement; but it was a courtesy DP and NL's foreign associates expected to receive. Similar courtesies were refused to a representative of Aussig.

An exchange of technical information was also agreed upon in principle between DP and NL's foreign associates on June 8, 1938, but not in detail, but this was repudiated by Rupprecht on September 16, 1938. No experience was ever exchanged pursuant thereto. DP continued agreeable to permit plant visits from the representatives of NL's for-

eign associates, but excluded all research and development information from said exchange arrangement. NL and DP were not exchanging this type of technical information at that time.

The 1933 agreement between TP and Krebs (Ex. E) and the evidence relating thereto does not distinctly disclose what rights and obligations Krebs acquired and assumed with respect to Tinc through TP; specifically whether Krebs acquired from TP a sublicense to Tinc U. S. patents, and the right to receive Tinc's experience (obtained from TG) conveyed to TP.

Upon the trial NL stated that Krebs obtained by the 1933 agreement sublicenses to all the U. S. patents available to NL, although in 1934 Jebson claimed that this did not include the United States patents of TAS and Tinc. At the trial DP claimed that by virtue of the 1933 agreement Krebs acquired sublicenses to the U. S. patents of TAS and Tinc provided such patents were then "used" by TP.

The language of the 1933 agreement does not contain a restriction of the grants to patents "used".

The labelling of its products by Krebs immediately after the execution of Ex. E indicates the belief of Krebs that it did obtain sublicenses under at least some Tinc U. S. patents.

87. DP's first offer to NL's foreign associates of a license under Article V of Exhibit E covered the "Ti-Tint" patent application filed in the United States by DP in 1934. The royalties asked by DP of NL's foreign associates for its proposed license were unsatisfactory and no patent application covering this invention was ever filed in any foreign country by DP or NL's foreign associates. In 1935 DP filed applications for foreign patents on its Blended Pig-

ments invention, upon which various foreign patents issued. These were the only titanium pigment patents filed by DP in the territory of NL's foreign associates without their specific request for filing. DP granted royalty-free licenses to NL's foreign associates on such patents and applications exclusive except as to DP and ICI. All expenses for maintaining (but not for securing) such patents were paid by NL's foreign associates.

88. The foreign associates of NL desired a general arrangement covering the exchange of patents between DP and themselves in order to eliminate the details of negotiating licenses of specific patents in specific agreements as required by Article V of Exhibit E. The contract between Blumenfeld, Terres Rares and CP provided for the exchange of future patents and technical information relating to the manufacture and use of titanium pigments between CP; Terres Rares, and its associated companies engaged in the manufacture and sale of titanium pigments outside the United States. Before 1933 Krebs disclaimed any obligation to Terres Rares and Blumenfeld under the CP, Terres Rares, Blumenfeld contract. In 1935, Krebs stated that it did not wish to enter into a general cross-licensing agreement with the foreign associates of NL until it was reasonably certain that it would have no further difficulties with Terres Rares and Blumenfeld under their contract with CP.

89. Negotiations for a general exchange of patents continued between DP and NL's foreign associates in 1938. DP refused to make a written general agreement for the exchange of licenses on present and future patents between

itself and NL's foreign associates because of the United States anti-trust laws. An oral understanding was reached between DP and NL's foreign associates on June 8, 1938, whereby each of said parties agreed to exchange such of its patents and applications as related to the manufacture and use of titanium pigments within the licensed field of Exhibit E with each other as might be desired by each from the other. Such of each other's patents and applications as were desired by DP and NL's foreign associates were to be licensed on a royalty-free basis in separate annual license agreements. Licenses so granted by DP to NL's foreign associates were to be exclusive except as to DP and in England as to ICI. Rupprecht expressed to NL and Tinc the view that the reservation was in fact without practical importance. All licenses granted DP by NL's foreign associates were subject to the approval of NL and were non-exclusive. All expenses for filing and maintaining DP patents in territories of NL's foreign associates were paid for by the foreign associates in whose territory the patent applications were filed.

90. DP acting in accordance with said oral understanding of June, 1938, granted royalty-free licenses to Tinc with the right to sublicense NL's foreign associates on June 20, 1938; April 21, 1939, May 10, 1940, and June 23, 1941 (Pl. Exs. N, Q, R, S, which licenses are uncanceled), and continued to make available to NL's foreign associates on a royalty-free basis all patent applications filed by it in the United States relating to the manufacture and use of titanium pigments until a short time before the transmission of such applications was made dependent on the securing of governmental permission. NL's foreign associates act-

ing in accordance with said oral understanding of June, 1938, made all of their United States patents and patent applications relating to the manufacture and use of titanium pigments available to DP and via Tinc entered into cross licensing agreements with DP (Pl. Exs. Q, R and S) in 1939, 1940 and 1941. Certain patents and applications obtained under these agreements by DP were of significance to DP's operations. No licenses under the applications of NL's foreign associates were granted to any other producer in the United States, except NL and DP. No licenses under the patents of NL's foreign associates were granted to any producer in the United States, except NL, DP and Zirconium. All of said license agreements were granted with the consent of NL. The licenses granted to NL's foreign associates by DP in Exs. M, N, Q, R and S on any patents issued in the name of DP in the territories of the foreign associates of NL were and are exclusive except for a reservation in favor of DP and ICI. Neither DP nor ICI ever made or attempted to make any use of said patents or applications in the territories of NL's foreign associates. The exchange of DP patent applications with NL's foreign associates has been suspended since 1941 during the present emergency, and "until the present emergency terminates".

91. The filing of DP's foreign applications in the territory of NL's foreign associates is under the complete control of NL's foreign associates and all expenses incurred in filing and maintaining said patents are borne by NL's foreign associates who may abandon said patents or applications licensed to them by DP at will upon notifying DP of its intention to so abandon in which event DP may

elect to maintain the patent on its own account. There is no evidence that DP would have maintained the patent applications and patents abroad if NL's foreign associates had not carried the costs. DP patents issued in the name of DP in the territory of NL's foreign associates were sub-licensed only if the sublicensees agreed not to export from the territory of the foreign associate.

92. No royalties were ever paid by DP to NL or by NL to DP (under the agreement made between NL and its foreign associates in 1937), and neither DP nor NL's foreign associates ever paid any royalties to each other for the use of the patents licensed by them in Exhibits M, N, Q, R, S.

93. The DP-Tinc licensing agreements of 1940 and 1941 did restrict and were intended to restrict the use and export of titanium pigments manufactured under any of said patents by purchasers of said pigments.

94. It is not claimed nor is there evidence that the defendants have controlled the supply of or restrained trade in ilmenite ore used in the commercial manufacture of titanium pigments in the United States.

95. The agreements and understandings entered into between the defendants and the other corporations herein named in Finding 1 have had the following necessary effects:

1. The defendant NL has refrained from competing with the other titanium pigment producers of the world outside of the Western Hemisphere and has not exported any titanium pigments or compounds outside

the Western Hemisphere unless requested so to do by its foreign associates.

2. DP has refrained from exporting titanium pigments or compounds outside the Western Hemisphere and has refrained from competing outside the Western Hemisphere with any of the co-conspirators in their respective exclusive territories.

3. All of the companies engaged in the manufacture of titanium pigments and compounds outside of the United States have refrained from importing such pigments or compounds into the United States and have refrained from competing with the defendants NL and DP in the United States.

4. The defendants NL, DP, and Tinc, have imposed restrictions on resales by purchasers of titanium pigments; but except to the extent found in Finding 93, the evidence does not establish as to DP that such restrictions were the result or effect of its agreements with NL or Tinc.

5. Prices of titanium pigments and compounds in the United States have been maintained at uniform levels and all competition with foreign producers in the manufacture and sale of titanium pigments and compounds in the United States has been eliminated.

6. The defendant DP has restricted the production of titanium pigments by its licensees Zirconium and VC to limit the competition of said licensees. Defendant NL has restricted the market of its licensee Zirconium.

7. The defendants NL and DP control and dominate the manufacture and sale of titanium pigments

and compounds in the United States to the exclusion of all actual or potential competition from any other potential entrant into the titanium pigment business in the United States.

8. The defendants NL and DP secured a monopoly on technical information relating to the manufacture and use of titanium pigments and certain apparatus and equipment necessary to the manufacture of certain titanium pigments to the exclusion and detriment of other producers now engaged in the titanium pigment business in the United States; when NL and DP ceased exchanging technical information, the titanium pigment business was a mature industry.

9. The defendants NL, DP and Tinc have utilized their patents which relate to the manufacture and use of titanium pigments to control and regulate the manufacture and sale of titanium pigments and compounds in the United States; and NL and Tinc with the cooperation of DP have done so throughout the rest of the world.

10. The defendants NL and Tinc, in cooperation with the European producers, have controlled the production of titanium pigments and compounds throughout the rest of the world outside of the United States and refrained from competing with their associated companies in markets allocated to said companies after the outbreak of hostilities in Europe in 1939, serving said allocated markets only at the request of their foreign associates and holding any profits therefrom in the markets so served for the associate to which said exclusive territory was allocated.

11. All of the patents and patent applications of NL's foreign associates in the United States which relate to the manufacture and use of titanium pigments have been and are available to DP on a royalty-free basis and similarly all of DP's patents and applications which relate to the manufacture and use of titanium pigments are available to NL's foreign associates in their respective exclusive territories throughout the rest of the world.

96. The intended effects of the acts of the defendants and the other members of the combination will probably continue to the extent that the post war conditions make possible.

CONCLUSIONS OF LAW

1. Beginning on or about July 30, 1920, NL and co-conspirator TAS and on various dates thereafter Tinc, DP and the others found herein to be co-conspirators continuing at all times thereafter to the date of these findings have been continuously engaged in a combination and conspiracy in restraint of trade and commerce in titanium pigments and compounds among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements and understandings in restraint of such trade and commerce.

2. Plaintiff is entitled to a decree.

SIMON H. RIFKIND,
U. S. District Judge.

IN THE
District Court of the United States
FOR THE SOUTHERN DISTRICT OF NEW YORK

— — —
Civil No. 26-258
— — —

UNITED STATES OF AMERICA,
Plaintiff,
against

NATIONAL LEAD COMPANY, TITAN COMPANY,
INC., E. I. DU PONT DE NEMOURS AND COM-
PANY,

Defendants.

FINAL DECREE

HON. SIMON H. RIFKIND,
United States District Judge.

Dated New York, October 11, 1945.

IN THE
District Court of the United States
 FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

NATIONAL LEAD COMPANY, TITAN COM-
 PANY, INC., E. I. DU PONT DE NEMOURS
 AND COMPANY,

Defendants.

Civil No. 26-258

FINAL DECREE

This cause came on to be heard upon the complaint and the answers thereto upon the evidence and upon argument of counsel. The Court having thereafter rendered and filed its opinion and having made and entered findings of fact and conclusions of law wherein the defendants have been found to have been engaged in a combination in restraint of trade and commerce in titanium pigments among the several states of the United States and of foreign nations, and that the defendants have been and now are parties to contracts, agreements, and understandings in restraint of such trade and commerce in violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 1);

Now, therefore, upon motion of plaintiff by Wendell Berge, Assistant Attorney General, Herbert Perman and William C. Dixon, Special Assistants to the Attorney General, Julian Caplan and Ephraim Jacobs, Special Attorneys,

and John F. X. McGohey, United States Attorney, for relief in accordance with the prayer of the complaint, and the defendants having severally appeared by counsel, it is ORDERED, ADJUDGED and DECREED as follows:

1. The term "titanium pigments" as used herein shall mean any product containing two percent (2%) or more of the element titanium in a chemically, mechanically or physically combined state and mixtures thereof which can be used as pigments, whether or not adapted for other uses, and also extenders to be used in conjunction with any such product.

2. The term "defendants" shall mean the corporations hereinafter listed who may be identified by the designated abbreviations:

NL	National Lead Company
Tinc	Titan Company, Inc.
DP	E. I. du Pont de Nemours and Company

3. The term "co-conspirators" shall mean the corporations hereinafter listed, who may be identified by the designated abbreviations:

TP	The Titanium Pigment Company, Inc.
Krebs	Krebs Pigment & Color Corporation
TAS	Titan Co. A/S
IG	Interessengemeinschaft Farbenindustrie Aktiengesellschaft
TG	Titangesellschaft m.b.H.
SIT	Société Industrielle du Titane
ICI	Imperial Chemical Industries, Ltd.
GW	Goodlass Wall and Lead Industries, Ltd.
ISC	Imperial Smelting Corporation, Ltd.
BTP	British Titan Products Company, Ltd.

NTP or Laporte	National Titanium Pigments, Ltd.
CL	Canadian Industries, Ltd.
CTP	Canadian Titanium Pigments, Ltd.
Kokusan or KK	Kokusan Kogyo Kabushiki Kaisha
TK	Titan Kogyo Kabushiki Kaisha
Terres Rares	Société des Produits Chimiques des Terres Rares
Thann	Fabriques des Produits Chimiques de Thann et de Mulhouse
Montecatini	Società Anonima Titanium
Aussig	Verein für Chemische und Metallur- gische Produktion.

4. The term "patents as herein defined" shall mean United States letters patent and applications as follows: (a) the letters patent and patent applications listed in Appendix A hereof; (b) all divisions, continuations or reissues of any of the foregoing patents and applications; (c) all patents issued upon such applications; (d) all patents which cover any titanium pigments or any process for the manufacture of titanium pigments issued to any of the defendants within five years from the date of this decree; and all such patents which any of the defendants acquires within such five years; and all such patents of which any of the defendants becomes the exclusive licensee within such five years with power to sublicense.

5. The following agreements are hereby adjudged to be unlawful under Section 1 of the Sherman Act and each of them is hereby cancelled and the defendants and each of them and all persons acting or claiming to act through, for or under them and all successors and subsidiaries of any

of the defendants are hereby enjoined and restrained from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto:

Agreement dated July 30, 1920, between TP and TAS (Exhibit A);

Agreement between TP and Krebs dated January 1, 1933, as amended January 1, 1941 (Exhibits E and E-3);

Agreements dated July 30, 1920, between NL, TP, The Titanium Alloy Manufacturing Company and TAS (Exhibits A-1 and A-2);

Agreement between TAS and SIT dated March 3, 1927 (Exhibit B);

Agreement between TAS and IG dated October 3 and 20, 1927 (Exhibit C);

Agreement between TAS and IG signed June 24 and October 20, 1927 (Exhibit C-1);

Agreement between TAS and TG signed October 3 and 20, 1927 (Exhibit C-3);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C-7);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C-8);

Agreement dated February 16, 1933 between ICI, ISC, GW and TINC (Exhibit F);

Agreements between TINC, SIT, TERRES RARES, and Thann dated June 5 and 17, 1935 (Exhibits G-1 and G-2);

Agreements between TINC, TERRES RARES, and IG, and between TINC, Terres Rares, IG, TG, Thann, and Doitsu both dated January 18, 1936 (Exhibits J and J-2);

Agreement between NL and CIL dated January 1, 1937 (Exhibit K);

Agreement between NL and CTP dated January 1, 1937, as amended February 27, 1939. (Exhibits K-1 and K-5);

Agreements between DP and TINC dated July 27, 1937, June 20, 1938, April 21, 1939, May 10, 1940, and June 23, 1941 (Exhibits M, N, Q, R and S), and the

"License Field Extender" agreements to which NL or TINC were parties, including the agreement between NL and TINC dated March 28, 1939 (Exhibit O);

provided, however, that the provisions of this paragraph with respect to the agreements between TP and Krebs dated January 1, 1933, as amended January 1, 1941 (Exhibits E and E-3) shall not go into effect until the expiration of nine months from the date of this decree.

6. Each of the defendants and each of their directors, officers, agents, employees, successors and subsidiaries and all persons acting, or claiming to act under, through or for them or any of them are hereby enjoined and restrained (a) from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves, the co-conspirators, or with any other person, partnership or corporation, which has as its pur-

pose or effect the continuing or renewing of any of the agreements listed in paragraph 5 hereof; (b) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect (1) to divide sales or manufacturing territories, (2) to allocate markets, (3) to limit or prevent United States imports or exports, (4) to grant to any third party any market as its exclusive territory, (5) to keep any third party out of any market; provided, however, that nothing contained in this subdivision (b) of this paragraph 6 shall prohibit any normal and usual arrangements between any defendant and its directors, officers, employees, agents, subsidiaries, or any dealer or distributor, whether or not a co-conspirator; (c) from restricting any purchaser of titanium pigments in the use thereof.

7. Each of the defendants is ordered to grant to any applicant therefor, including any defendant or co-conspirator, a non-exclusive license under any or all of the patents as herein defined at a uniform, reasonable royalty. Such grant may, at the option of the licensor, be conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under any and all patents covering titanium pigments or their manufacture, now issued or pending, or issued within five years from the date of this decree, if any, owned or controlled by such applicant. Such license or reciprocal license may, at the option of either party, contain a provision for the inspection of the books and records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and

payable and no other information. During a period of three years from the date of this decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing at a reasonable charge, by the licensor to the licensee, of the methods and processes used by the former at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium pigments. The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Defendants are restrained from attempting to enforce any rights under any foreign patents owned by them or under which they are the exclusive licensees to prevent the exportation of titanium pigments from the United States to any foreign country.

8. Within one year from the date of this decree, defendants NL and Tinc shall present to the Court for its approval a plan for divesting themselves of their stock holdings and other financial interests, direct and indirect, in BTP, CTP, TG and TK, or for the purchase of the entire stock holdings and other financial interests, direct and indirect, in said companies or any of them. Such plan of sale shall not provide for the transfer of such stock or interest to any other defendant or to any corporation in which any defendant will, upon consummation of the plan, have any interest, provided that this provision shall not preclude transfer of said defendants' stock holdings in BTP to ISC, GW, and ICI, or any of them, or preclude transfer of said defendants' stock holdings in CTP to CIL. The plan shall provide for its completion within two years from the date of this decree.

9. Either American Zirconium Corporation or Virginia Chemical Corporation, their successors or assigns, may at

their option, if exercised within six months from the date of this decree, apply for licenses from DP under the provisions of paragraph 7. In the event American Zirconium Corporation, Virginia Chemical Corporation or their respective successors or assigns exercise the foregoing option, DP is enjoined from collecting royalties under any existing license agreement relating to titanium pigments between it and the person exercising the option in respect of any period subsequent to such exercise. Defendants NL, Tinc and DP are hereby enjoined from bringing, or threatening to bring, any action against any person or corporation for the alleged infringement prior to the date of this decree of any patent as herein defined.

- 10. The Attorney General of the United States or his proper representative shall, for the purpose of securing compliance with this decree, be permitted (1) access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any matters contained in this decree, (2) subject to any legally recognized privilege, without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this decree in which the United States is a party or as otherwise required by law.

11. Judgment is entered against the defendants for all costs to be taxed in this proceeding.

12. The cancellations, injunctions and all executory action provided for under this decree shall not become effective or operative until ninety days from the date of this decree.

13. Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person or corporation that may hereafter become bound, in whole or in part, thereby to apply to the Court at any time for such further orders, modifications, vacations or directions as may be necessary or appropriate

- (1) for the construction or carrying out of this decree, and
- (2) for the enforcement of compliance therewith and the punishment of violations thereof.

Dated at New York,
October 11, 1945.

SIMON H. RIFKIND,
District Judge.

APPENDIX A

I. *National Lead Company:*A. *Patents.*

Patent No.	Date of Issue
1,695,270	Dec. 18, 1928
1,697,929	Jan. 8, 1929
1,738,765	Dec. 10, 1929
1,758,472	May 13, 1930
1,773,727	Aug. 26, 1930
1,820,987	Sept. 1, 1931
1,820,988	Sept. 1, 1931
1,831,852	Nov. 17, 1931
1,847,539	Mar. 1, 1932
1,856,565	May 3, 1932
1,889,027	Nov. 29, 1932
1,906,729	May 2, 1933
1,906,730	May 2, 1933
1,916,236	July 4, 1933
1,929,521	Oct. 10, 1933
1,957,528	May 8, 1934
1,969,061	Aug. 7, 1934
2,034,923	Mar. 24, 1936
2,039,432	May 5, 1936
2,055,222	Sept. 22, 1936
2,084,826	June 22, 1937
2,084,917	June 22, 1937
2,084,918	June 22, 1937
2,091,799	Aug. 31, 1937
2,098,278	Nov. 9, 1937
2,113,945	Apr. 12, 1938
2,113,946	Apr. 12, 1938
Re. 21,693	Jan. 14, 1941
2,130,560	Sept. 20, 1938

Patent No.	Date of Issue
2,130,565	Sept. 20, 1938
2,132,491	Oct. 11, 1938
2,133,251	Oct. 11, 1938
2,140,222	Dec. 13, 1938
2,148,283	Feb. 21, 1939
2,154,130	Apr. 11, 1939
2,166,082	July 11, 1939
2,167,626	Aug. 1, 1939
2,167,627	Aug. 1, 1939
2,167,628	Aug. 1, 1939
2,170,800	Aug. 29, 1939
2,170,940	Aug. 29, 1939
2,176,875	Oct. 24, 1939
2,176,876	Oct. 24, 1939
2,176,877	Oct. 24, 1939
2,184,938	Dec. 26, 1939
2,202,594	May 28, 1940
2,211,828	Aug. 20, 1940
2,212,629	Aug. 27, 1940
2,215,857	Sept. 24, 1940
2,215,866	Sept. 24, 1940
2,222,385	Nov. 19, 1940
2,227,239	Dec. 31, 1940
2,234,681	Mar. 11, 1941
2,244,258	June 3, 1941
2,246,062	June 17, 1941
2,278,709	Apr. 7, 1942
2,280,795	Apr. 28, 1942
2,285,485	June 9, 1942
2,285,486	June 9, 1942
2,285,894	June 9, 1942
2,290,539	July 21, 1942
2,291,091	July 28, 1942
2,291,082	July 28, 1942

Patent No.	Date of Issue
2,316,840	Apr. 20, 1943
2,316,841	Apr. 20, 1943
2,329,641	Sept. 14, 1943
2,334,663	Nov. 16, 1943
2,341,994	Feb. 15, 1944
2,344,265	Mar. 14, 1944
2,344,288	Mar. 14, 1944
2,344,319	Mar. 14, 1944
2,346,296	Apr. 11, 1944
2,346,320	Apr. 11, 1944
2,346,188	Apr. 11, 1944
2,346,322	Apr. 11, 1944
2,365,559	Dec. 19, 1944
2,365,560	Dec. 19, 1944
2,367,738	Jan. 9, 1945
2,368,591	Jan. 30, 1945
2,369,468	Feb. 13, 1945
2,378,675	June 19, 1945
2,378,790	June 19, 1945

B. Patent Applications.

Serial No.	Filing Date	Inventor
364,986	Nov. 9, 1940	S. W. Martin
441,990	May 6, 1942	W. Grave et al.
453,300	Aug. 1, 1942	J. L. Turner et al.
454,185	Aug. 8, 1942	H. V. Alessandroni
454,193	Aug. 8, 1942	S. S. Cole et al.
454,194	Aug. 8, 1942	W. Y. Agnew
459,026	Sept. 19, 1942	C. W. Rau et al.
489,576	June 3, 1943	F. L. Kingsbury
500,921	Sept. 2, 1943	W. Y. Agnew
505,082	Oct. 5, 1943	A. P. Honchar
522,845	Feb. 17, 1944	S. G. Tinsley
526,130	Mar. 11, 1944	F. L. Kingsbury et al.
538,549	June 2, 1944	A. P. Honchar

Serial No.	Filing Date	Inventor
539,332	June 8, 1944	J. M. O'Shaughnessy
546,903	July 27, 1944	J. Barksdale
555,902	Sept. 26, 1944	S. S. Cole
572,658	Jan. 13, 1945	J. L. Turner et al.
585,812	Mar. 30, 1945	W. F. Meister
599,129	June 12, 1945	S. S. Cole
605,627	July 17, 1945	R. W. Ancrum

II. Titan Company Inc:

A. Patents.

Patent No.	Date of Issue
2,055,221	Sept. 22, 1936
2,111,460	Mar. 15, 1938
*2,121,215	June 21, 1938
2,130,554	Sept. 30, 1938
2,139,686	Dec. 13, 1938
2,140,235	Dec. 13, 1938
2,140,236	Dec. 13, 1938
2,161,755	June 6, 1939
2,200,373	May 14, 1940
*2,224,987	Dec. 17, 1940
2,242,320	May 20, 1941
2,246,030	June 17, 1941
*2,260,177	Oct. 21, 1941
*2,303,305	Nov. 24, 1942
*2,303,306	Nov. 24, 1942
*2,303,307	Nov. 24, 1942
*2,339,793	Jan. 25, 1944
2,339,808	Jan. 25, 1944
2,365,135	Dec. 12, 1944

B. Patent Applications.

Serial No.	Filing Date	Inventor
495,946	July 23, 1943	R. W. Ancrum

*Vested in Alien Property Custodian.

III. *Titan Company A/S*: Exclusively licensed to National Lead Co.

A. Patents:

Patent No.	Date of Issue
*1,852,510	Apr. 5, 1932
*1,919,425	July 25, 1933

IV. *I. G. Farbenindustrie*: Exclusively licensed to National Lead Co.

A. Patents.

Patent No.	Date of Issue
*1,813,649	July 7, 1931
1,816,388	July 28, 1931
*1,849,153	Mar. 15, 1932
*1,850,154	Mar. 22, 1932
*1,850,286	Mar. 22, 1932
*1,878,013	Sept. 20, 1932
*1,891,210	Dec. 13, 1932
*1,891,911	Dec. 27, 1932
*1,934,778	Nov. 14, 1933
*1,941,285	Dec. 26, 1933
*1,995,580	Mar. 26, 1935
*2,068,294	Jan. 19, 1937
*2,118,916	May 31, 1938
*2,121,408	June 21, 1938
*2,122,180	June 28, 1938
*2,138,384	Nov. 29, 1938
*2,144,577	Jan. 17, 1939
*2,158,520	May 16, 1939
*2,161,975	June 13, 1939
*2,187,821	Jan. 23, 1940
*2,280,223	Apr. 21, 1942
*2,337,103	Dec. 21, 1943

*Vested in Alien Property Custodian.

V. *Titangesellschaft*: Exclusively licensed to National Lead Co.

Patent No.	Date of Issue
*2,275,856	Mar. 10, 1942
*2,367,118	Jan. 9, 1945

VI. *DuPont*:

A. Patents.

Patent No.	Date of Issue
1,707,248	Apr. 2, 1929
1,707,257	Apr. 2, 1929
1,709,999	Apr. 23, 1929
1,750,287	Mar. 11, 1930
Re. 18,790	Apr. 4, 1933
Re. 18,854	May 30, 1933
1,766,592	June 24, 1930
1,797,777	Mar. 24, 1931
1,827,691	Oct. 13, 1931
1,832,666	Nov. 17, 1931
1,836,275	Dec. 15, 1931
1,845,633	Feb. 16, 1932
1,846,188	Feb. 23, 1932
1,851,487	Mar. 29, 1932
Re. 19,594	May 28, 1935
1,864,504	June 21, 1932
1,885,187	Nov. 1, 1932
1,885,921	Nov. 1, 1932
1,885,934	Nov. 1, 1932
1,892,693	Jan. 3, 1933
1,899,572	Feb. 28, 1933
1,899,573	Feb. 28, 1933
1,899,574	Feb. 28, 1933
1,902,203	Mar. 21, 1933

*Vested in Alien Property Custodian.

Patent No.	Date of Issue
1,902,204	Mar. 21, 1933
1,915,393	June 27, 1933
1,922,816	Aug. 15, 1933
1,931,380	Oct. 17, 1933
1,931,381	Oct. 17, 1933
1,937,037	Nov. 28, 1933
1,943,497	Jan. 16, 1934
1,975,339	Oct. 2, 1934
1,977,577	Oct. 16, 1934
1,977,582	Oct. 16, 1934
2,006,342	July 2, 1935
2,018,955	Oct. 29, 1935
2,026,862	Jan. 7, 1936
2,031,750	Feb. 25, 1936
2,044,941	June 23, 1936
2,044,942	June 23, 1936
2,045,836	June 30, 1936
2,046,054	June 30, 1936
2,047,208	July 14, 1936
2,049,504	Aug. 4, 1936
2,062,133	Nov. 24, 1936
2,062,134	Nov. 24, 1936
Re. 21,427	Apr. 16, 1940
2,098,025	Nov. 2, 1937
2,098,026	Nov. 2, 1937
2,098,054	Nov. 2, 1937
2,098,055	Nov. 2, 1937
2,098,056	Nov. 2, 1937
2,111,236	Mar. 15, 1938
2,111,788	Mar. 22, 1938
2,112,966	Apr. 5, 1938
2,113,380	Apr. 5, 1938
2,125,340	Aug. 2, 1938
2,125,342	Aug. 2, 1938

Patent No.	Date of Issue
2,127,247	Aug. 16, 1938
2,136,313	Nov. 8, 1938
2,138,090	Nov. 29, 1938
2,138,118	Nov. 29, 1938
2,149,329	Mar. 7, 1939
2,149,370	Mar. 7, 1939
2,150,235	Mar. 14, 1939
2,150,236	Mar. 14, 1939
2,151,331	Mar. 21, 1939
2,151,339	Mar. 21, 1939
2,159,055	May 23, 1939
2,163,385	June 20, 1939
2,166,221	July 18, 1939
2,166,257	July 18, 1939
2,177,250	Oct. 24, 1939
2,177,254	Oct. 24, 1939
2,177,269	Oct. 24, 1939
2,180,961	Nov. 21, 1939
2,183,365	Dec. 12, 1939
2,187,050	Jan. 16, 1940
2,192,501	Mar. 5, 1940
2,192,587	Mar. 5, 1940
2,192,953	Mar. 12, 1940
2,192,954	Mar. 12, 1940
2,192,956	Mar. 12, 1940
2,193,559	Mar. 12, 1940
2,193,563	Mar. 12, 1940
2,197,953	Apr. 23, 1940
2,212,935	Aug. 27, 1940
2,213,542	Sept. 3, 1940
2,214,132	Sept. 10, 1940
2,214,815	Sept. 17, 1940
2,216,536	Oct. 1, 1940
2,216,879	Oct. 8, 1940

Patent No.	Date of Issue
2,216,889	Oct. 8, 1940
2,218,655	Oct. 22, 1940
2,218,704	Oct. 22, 1940
2,219,129	Oct. 22, 1940
2,220,952	Nov. 12, 1940
2,220,966	Nov. 12, 1940
2,224,777	Dec. 10, 1940
2,226,142	Dec. 24, 1940
2,226,147	Dec. 24, 1940
2,231,455	Feb. 11, 1941
2,231,456	Feb. 11, 1941
2,231,467	Feb. 11, 1941
2,231,468	Feb. 11, 1941
2,232,164	Feb. 18, 1941
2,232,168	Feb. 18, 1941
2,232,723	Feb. 25, 1941
2,233,358	Feb. 25, 1941
2,237,764	Apr. 8, 1941
2,253,551	Aug. 26, 1941
2,253,590	Aug. 26, 1941
2,253,595	Aug. 26, 1941
2,254,630	Sept. 2, 1941
2,257,278	Sept. 30, 1941
2,259,638	Oct. 21, 1941
2,260,826	Oct. 28, 1941
2,260,871	Oct. 28, 1941
2,265,386	Dec. 9, 1941
2,266,233	Dec. 16, 1941
2,266,260	Dec. 16, 1941
2,266,793	Dec. 23, 1941
2,269,139	Jan. 6, 1942
2,273,431	Feb. 17, 1942
2,274,521	Feb. 24, 1942
2,274,541	Feb. 24, 1942

Patent No.	Date of Issue
2,280,590	Apr. 21, 1942
2,280,619	Apr. 21, 1942
2,282,006	May 5, 1942
2,282,303	May 12, 1942
2,282,527	May 12, 1942
2,284,585	May 26, 1942
2,284,772	June 2, 1942
2,286,881	June 16, 1942
2,286,882	June 16, 1942
2,286,910	June 16, 1942
2,287,161	June 23, 1942
2,287,416	June 23, 1942
2,287,440	June 23, 1942
2,293,861	Aug. 25, 1942
2,294,381	Sept. 1, 1942
2,294,394	Sept. 1, 1942
2,296,066	Sept. 15, 1942
2,296,618	Sept. 22, 1942
2,296,636	Sept. 22, 1942
2,296,637	Sept. 22, 1942
2,296,639	Sept. 22, 1942
2,301,412	Nov. 10, 1942
2,304,110	Dec. 8, 1942
2,305,368	Dec. 15, 1942
2,307,048	Jan. 5, 1943
2,313,844	Mar. 16, 1943
2,319,824	May 25, 1943
2,321,490	June 8, 1943
2,326,592	Aug. 10, 1943
2,331,496	Oct. 12, 1943
2,331,515	Oct. 12, 1943
2,337,162	Dec. 21, 1943
2,337,215	Dec. 21, 1943
2,342,483	Feb. 22, 1944

Patent No.	Date of Issue
2,345,980	Apr. 4, 1944
2,345,985	Apr. 4, 1944
2,346,085	Apr. 4, 1944
2,346,091	Apr. 4, 1944
2,357,089	Aug. 29, 1944
2,357,101	Aug. 29, 1944
2,358,167	Sept. 12, 1944
2,361,986	Nov. 7, 1944
2,361,987	Nov. 7, 1944
2,366,047	Dec. 26, 1944
2,369,246	Feb. 13, 1945
2,369,262	Feb. 13, 1945
2,374,088	Apr. 17, 1945
2,374,114	Apr. 17, 1945
2,378,148	June 12, 1945

B. Patent Applications.

Serial No.	Filing Date	Inventor
391,309	Apr. 30, 1941	H. H. Schaumann
392,941	May 10, 1941	G. R. Seidel
426,247	Jan. 9, 1942	C. M. Olson
426,248	Jan. 9, 1942	Olson & Booge
426,250	Jan. 9, 1942	Keats & Peterson
426,251	Jan. 9, 1942	J. L. Keats
449,665	July 3, 1942	C. M. Olson
449,666	July 3, 1942	C. M. Olson
449,667	July 3, 1942	C. M. Olson
472,876	Jan. 19, 1943	Olson & Krchma
483,357	Apr. 16, 1943	I. J. Krchma
502,019	Sept. 11, 1943	R. M. McKinney
521,132	Feb. 4, 1944	Booge & Seidel
521,685	Feb. 9, 1944	J. H. Peterson
521,686	Feb. 9, 1944	J. H. Peterson
537,408	May 26, 1944	R. M. McAdam

Serial No.	Filing Date	Inventor
537,409	May 26, 1944	R. M. McAdam
538,339	June 1, 1944	C. M. Olson
541,844	June 23, 1944	R. W. Sullivan
557,381	Oct. 5, 1944	R. L. McCleary
565,567	Nov. 28, 1944	G. L. Lewis
567,327	Dec. 8, 1944	E. N. Kramer
571,534	Jan. 5, 1945	W. G. Vainoy
573,804	Jan. 20, 1945	R. L. McCleary
574,033	Jan. 22, 1945	R. L. McCleary
574,831	Jan. 26, 1945	R. W. Sullivan
588,973	Apr. 18, 1945	R. M. McKinney
590,584	Apr. 27, 1945	R. D. Nutting
596,075	May 26, 1945	H. C. Gullledge
604,303	July 10, 1945	F. W. Lane

448 In the United States District Court

[Title omitted.]

Petition for appeal

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 11th day of October, 1945, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignments of error and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.

William C. Dixon,
WILLIAM C. DIXON,
Special Assistant to the Attorney General.

This 10th day of December, 1945.

449 In United States District Court

[Title omitted.]

Order allowing appeal

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 11th day of October, 1945, and having also made and filed its petition and appeal, assignments of error and prayer for reversal, and state-

ment of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided.

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for.

ALFRED C. COXE,
U. S. District Judge.

Dated This 10th day of December, 1945.

451 In United States District Court

[Title omitted.]

Assignment of errors and prayer for reversal

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the District Court on October 11, 1945, in the above-entitled cause, and says that in the entry of the final judgment the District Court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in failing to require each defendant to license its existing titanium pigment patents free of royalty until the court shall have determined, on application by any defendant, that the effects of the defendants' illegal combination, as set forth in the court's findings of fact and conclusions of law, have been fully dissipated.

2. The court erred in failing to require National Lead Company and E. I. du Pont de Nemours and Company each to submit, within a year from the date of the decree, a plan for transferring to a new corporation to be created by it one of its two principal titanium pigment plants and all physical property customarily used in connection therewith, and for the sale of the stock of said new corporation to a person or persons other than the defendants herein and their co-conspirators.

3. The court erred in failing to require National Lead and E. I. du Pont de Nemours and Company to furnish to any applicant, at a reasonable charge, during a period of three years from the date of the decree as affirmed on mandate, technical information desired by the applicant relating to the methods and processes for manufacturing titanium pigments.

4. The court erred in conditioning the requirements as to licensing and as to imparting technical information, em-

bodied in paragraph 7 of its decree, upon the granting by the applicant for such license or technical information of a reciprocal patent license or technical information.

5. The court erred in requiring, in paragraph 9 of the decree, the licensees of E. I. du Pont de Nemours and Company to elect whether to continue under their present licenses from that company or to apply to it for licenses under paragraph 7 of the decree, within a period of only six months of the date of the decree.

6. The court erred in the limitations and qualifications of paragraph 7 of the decree.

7. The court erred in failing to grant to the plaintiff the relief to which it is entitled.

Wherefore, plaintiff prays that the final judgment of the District Court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.

William C. Dixon,
WILLIAM C. DIXON,
Special Assistant to the Attorney General.

512 In the Supreme Court of the United States
No. 89

THE UNITED STATES OF AMERICA, APPELLANT

vs.

NATIONAL LEAD COMPANY, TITAN COMPANY, INC., E. I.
DU PONT DE NEMOURS AND COMPANY, APPELLEES

Statement of points to be relied upon

Filed May 3, 1946

Now comes the appellant in the above entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

Dated this 30th day of April 1946.

J. HOWARD McGRATH,
Solicitor General.

Service of the foregoing statement of points to be relied

upon and receipt of a copy thereof are hereby acknowledged this 1st day of May 1946.

WM. DWIGHT WHITNEY,
*Counsel for E. I. duPont de Nemours
and Company.*

BETHUEL M. WEBSTER,
*Counsel for National Lead Company
and Titan Company, Inc.*

514 Supreme Court of the United States
No. 90

NATIONAL LEAD COMPANY AND TITAN
COMPANY, INC., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

*Statement of points to be relied upon, designation of parts
of the record necessary for consideration thereof*

Filed May 3, 1946

The appellants National Lead Company and Titan Company, Inc., for their statement of the points on which they intend to rely in their appeal to this Court adopt the points contained in their assignment of errors heretofore filed herein.

Said appellants respectfully refer to the stipulation dated April 30, 1946 and filed in this Court on May 3, 1946 for the parts of the record necessary for the consideration of the foregoing points and therefore designated as parts of the record to be printed by the Clerk of the Supreme Court of the United States.

BETHUEL M. WEBSTER,
Counsel for Appellants,

National Lead Company and Titan Company, Inc.

515 Service of the Foregoing Statement of Points to be Relied upon, Designation of Parts of Record Necessary for Consideration thereof is acknowledged this 2nd day of May, 1946.

WENDELL BERGE,
*Attorney for Appellee,
United States of America.*

517 In the Supreme Court of the United States
No. 91

E. I. DU PONT DE NEMOURS AND COMPANY, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

Statement of points

Filed May 3, 1946

Appellant, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, states that the points upon which it intends to rely in said Court in this case are as follows:

1. Appellant hereby adopts its Assignment of Errors as and for its Statement of Points upon which it intends to rely in this case.

April 29, 1946.

Wm. Dwight Whitney,
WM. DWIGHT WHITNEY,
15 Broad Street, New York, N. Y.,

Gerhard A. Gesell,
GERHARD A. GESELL,
Union Trust Building, Washington, D. C.,
Counsel for Appellant.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Statement of Points is hereby acknowledged this 30 day of April 1946.

J. HOWARD McGRATH,
Solicitor General of the United States,
Counsel for Appellee.

519 In the Supreme Court of the United States

*Stipulation designating parts of the
record to be printed*

Filed May 3, 1946

It is stipulated that the Clerk of this Court shall print all parts of the record heretofore filed except
520 Exhibits 1, 2, 3, 4, 5, 24, 25, 26, 42, 43, 44; 450
through 468, 473, 474, the last two attachments of
Exhibit 177 (labeled on their face as "Exhibit S" and

"Exhibit T"), the last two attachments of Exhibit 600, 1229, NL Exhibits 18 through 22 and DP Exhibit 97.

April 30, 1946.

J. HOWARD McGRATH,
Solicitor General of the United States.

CLIFTON P. WILLIAMSON,
BETHUEL M. WEBSTER,
*Counsel for National Lead Company and
Titan Company, Inc.*

WM. DWIGHT WHITNEY,
GERHARD A. GESELL,
*Counsel for E. I. du Pont de Nemours
and Company.*

521

Supreme Court of the United States
Nos. 89-90-91—October Term, 1946

THE UNITED STATES OF AMERICA, APPELLANT
vs.

NATIONAL LEAD COMPANY ET AL.;

NATIONAL LEAD COMPANY ET AL., APPELLANTS
vs.

THE UNITED STATES OF AMERICA; AND E. I. DU PONT DE
NEMOURS AND COMPANY, INC., APPELLANT

vs.

THE UNITED STATES OF AMERICA

Order noting probable jurisdiction

May 20, 1946

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice JACKSON took no part in the consideration or decision of this order.

453

In United States District Court

[Title omitted.]

Petition for appeal

National Lead Company and Titan Company, Inc., de-
endants in the above-entitled cause, considering them-

selves aggrieved by the Final Decree of this Court entered on October 11, 1945, do hereby pray an appeal from said Final Decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, these defendants present to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein these defendants consider the Final Decree erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition to which reference is hereby made.

These defendants pray that their appeal may be allowed and that citation be issued as provided by law, that a stay of the Final Decree appealed from be granted pending said appeal, that an appeal bond in the amount of Two Hundred Fifty Dollars (\$250), which is hereby tendered by these defendants, be approved, and that
454 a transcript of the record, proceedings and documents upon which said Final Decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Dated, December 10, 1945.

Bethuel M. Webster,
BETHUEL M. WEBSTER,
Clifton P. Williamson,
CLIFTON P. WILLIAMSON,

*Attorneys for National Lead Company
and Titan Company, Inc.*

455

In United States District Court

[Title omitted.]

Order allowing appeal

The defendants-appellants, National Lead Company and Titan Company, Inc., and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the Final Decree of this Court entered on October 11, 1945, and having presented and filed their Petition for Appeal, Assignment of Errors, Prayer for Reversal, and Statement as to Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided;

It is ordered that an appeal be and it hereby is allowed

to the Supreme Court of the United States as prayed for and

It is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and Final Decree in this cause and transmit them to the Supreme Court of the United States so that they will be in said Court within forty (40) days of this date; and

456 It is further ordered that security for costs on this appeal be fixed in the sum of Two Hundred Fifty Dollars (\$250), and that the bond in said amount [tendered by these defendants-appellants be and hereby is approved.

ALFRED C. COXE,
*District Judge of the United States
for the Southern District of New York.*

Dated December 10, 1945.

457 In United States District Court

[Title omitted.]

Assignment of errors and prayer for reversal

National Lead Company and Titan Company, Inc., defendants in the above-entitled cause, in connection with their Petition for Appeal to the Supreme Court of the United States, hereby assign error to the record and proceedings and the entry of the Final Decree of said District Court on October 11, 1945, and say that in the entry of the Final Decree the District Court committed error to the prejudice of these defendants in the following particulars:

1. The Court erred in holding and decreeing that the following agreements are unlawful under Section 1 of the Sherman Act; in canceling said agreements, and in enjoining these defendants, and all persons acting or claiming to act through or for them, from the further performance of any of the provisions of said agreements or of any agreements amendatory thereof or supplemental thereto:

Agreement dated July 30, 1920, between TP and TAS (Exhibit A);

Agreement between TP and Krebs dated January 1, 1933, as amended January 1, 1941 (Exhibits E and E-3);

458 Agreements dated July 30, 1920, between NL, TP, The Titanium Alloy Manufacturing Company and TAS (Exhibits A-1 and A-2):

Agreement between TAS and SIT dated March 3, 1927 (Exhibit B);

Agreement between TAS and IG dated October 3 and 20, 1927 (Exhibit C);

Agreement between TAS and IG signed June 24 and October 20, 1927 (Exhibit C-1);

Agreement between TAS and TG signed October 3 and 20, 1927 (Exhibit C-3);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C-7);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C-8);

Agreement dated February 16, 1933 between ICI, ISC, GW and TINC (Exhibit F);

Agreements between TINC, SIT, TERRES RARES, and Thann dated June 5 and 17, 1935 (Exhibits G-1 and G-2);

Agreements between TINC, TERRES RARES, and IG, and between TINC, Terres Rares, IG, TG, Thann, and Doitsu both dated January 18, 1936 (Exhibits J and J-2);

Agreements between NL and CIL dated January 1, 1937 (Exhibit K);

Agreement between NL and CIL dated January 1, 1937 as amended February 27, 1939 (Exhibits K-1 and K-5);

Agreements between DP and TINC dated July 27, 1937, June 20, 1938, April 21, 1939, May 10, 1940, and June 23, 1941 (Exhibits M, N, Q, R and S) and the

"License Field Extender" agreements to which NL or TINC were parties including the agreement between NL and TINC dated March 28, 1929 (Exhibit O).

(See par. 5 of the Final Decree herein.)

2. The Court erred in enjoining and restraining these defendants and each of their directors, officers, agents, employees, successors and subsidiaries, and all persons acting, or claiming to act, under, through or for them:

459 (a) From entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under, any contract, agreement, understanding, plan or program among themselves, the co-conspirators, or with any other person, partnership or corporation, which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph 1 hereof;

(b) From entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect:

- (1) to divide sales or manufacturing territories;
- (2) to allocate markets;

(3) to limit or prevent United States imports and exports;

(4) to grant to any third party any market as its exclusive territory;

(5) to keep any third party out of any market;

(c) From restricting any purchaser of titanium pigments in the use thereof.

(See par. 6 of the Final Decree herein.)

3. The Court erred in ordering these defendants to grant to any applicant therefor a non-exclusive license, on a uniform, reasonable royalty basis, under:

(a) any or all of their existing United States patents and patent applications, and

460 (b) within a period of five years all patents which cover any titanium pigments or any process for the manufacture of titanium pigments, issued to these defendants or which they may acquire or under which they may become exclusive licensees with the right to grant sublicenses.

(See par. 7 of the Final Decree herein.)

4. The Court erred in holding and decreeing that these defendants may at their option or the option of the licensee impart in writing, at a reasonable charge by the licensor to the licensee, information as to the methods and processes used by the licensor at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium pigments. (See par. 7 of the Final Decree herein.)

5. The Court erred in ordering these defendants to present for the Court's approval within one year from the date of the Final Decree a plan for divesting themselves of their stockholdings and other financial interests, direct or indirect, in BTP, CTP, TG and TK, or for the purchase of the entire stock holdings and other financial interests, direct or indirect, in said companies or any of them, and that the plan shall provide for its completion within two years from the date of the Final Decree. (See par. 8 of the Final Decree herein.)

6. The Court erred in enjoining these defendants from bringing or threatening to bring any action against any person or corporation for the alleged infringement, prior to the date of the Final Decree, of any patent or patent application owned by these defendants or under which they had an exclusive license or the right to grant sublicenses. (See par. 9 of the Final Decree herein.)

461 7. The Court erred in holding that the agreements were not justified as ancillary to the granting of a license under a patent. (See Opinion herein, p. 20.)

8. The Court erred in refusing to hold that the 1920 contract escaped the condemnation of the Sherman Act because it was reasonably ancillary to a lawful principal purpose, such as the sale of a business. (See Opinion herein, p. 21.)

9. The Court erred in holding that it could invalidate contracts with parties who were not within its jurisdiction. (See Opinion herein, p. 23.)

10. The Court erred in holding that the plaintiff need not show injury to the public. (See Opinion herein, p. 23.)

11. The Court erred in refusing to hold or find that American producers cannot do business in a cartelized world except on cartel terms and in holding that this subject was not a proper subject for its consideration. (See Opinion herein, p. 24.)

12. The Court erred in refusing to hold that certain issues in the case were moot because of the intervention of war with Germany, Japan and Italy. (See Opinion herein, p. 25.)

13. The Court erred in refusing to hold that the British and Canadian contracts had become moot because of proposed new agreements eliminating the objectionable features of the old agreements. (See Opinion herein, p. 27.)

14. The Court erred in refusing to hold that the agreement between DP and NL was a valid exchange of patents, present and future, between competitors and was not a violation of the Sherman Act. (See Opinion herein, p. 38.)

462 15. The Court erred in finding that a purpose of the 1920 agreement was to keep patent rights and technical know-how as the exclusive possession of the contracting parties and to prevent competition between the parties to the agreement. (See Finding of Fact No. 46 herein.)

16. The Court erred in finding that the intended purpose of the acquisition and control of TAS by NL was to utilize TAS and the contract of 1920 to further control competition in the manufacture of titanium pigments and compounds in all markets of the world, including the United States. (See Finding of Fact No. 47 herein.)

17. The Court erred in finding defendants NL and TAS agreed to have TAS, and subsequently defendant TINC, form in each of the important industrial countries of the world an association with a local corporation or firm which contemplated the manufacture and sale of titanium pigments and compounds, or which could contribute to the technical or commercial development, or which threatened to be a serious competitor of NL and TAS, a new company in which NL or TAS were to have a part interest. (See Finding of Fact No. 48 herein.)

18. The Court erred in finding that prior to 1933, NL and TINC believed that ICI and GW were planning to engage in the manufacture of titanium pigments and compounds in Great Britain, and that ICI had begun development work preparatory to engaging in the manufacture and sale of titanium pigments and compounds, and that NL and TINC were apprehensive of their competition especially as ICI was a very powerful corporation, although it had never manufactured pigments. (See Finding of Fact No. 52 herein.)

463 19. The Court erred in finding that prior to 1936 NL, TINC, IG and TG believed that local Japanese companies were planning to manufacture and sell titanium pigments and compounds and would engage in exports which would lead to competition in all markets of the world including the United States. (See Finding of Fact No. 54 herein.)

20. The Court erred in finding that in 1935 NL agreed with CIL, BTP and Laporte to maintain prices on American titanium pigments sold by NL in Canada, above the prices charged for titanium pigments manufactured by BTP or Laporte and sold by BTP and Laporte in the Canadian market. (See Finding of Fact No. 57 herein.)

21. The Court erred in finding that the defendants NL and TINC and their foreign associates, TG, BTP and SIT, exchanged full and complete information relating to sales prices of titanium pigments and the activities of any other companies and potential competitors engaged in the titanium business in any of the markets of the world. (See Finding of Fact No. 63 herein.)

22. The Court erred in finding that each and all of the various contracts (Exhibit A to A-2 inclusive, B, C to C-8 inclusive, F to F-6 inclusive, J to J-4 inclusive, and K to K-4 inclusive) has had the intended effect of

(1) preventing competition among the various parties

to said agreements within the exclusive territory allocated to the parties in their respective contracts.

(2) creating a world-wide patent pool of many of the patents of commercial value relating to the manufacture of titanium pigments and compounds within the licensed field, as defined in said agreements in which said patents have been made available only to the parties to said contracts;

(3) creating a world-wide pool of useful technical information relating to the manufacture and use of titanium pigments, available only to any of the parties to said contracts within their respective exclusive territories;

(4) enabling the parties to said contracts outside the United States to facilitate the control of production and prices of all titanium pigments and compounds produced within their respective exclusive territories;

(5) completely preventing any patent legislation among the parties; and

(6) accelerating the spread of improvement in the product and processes throughout the world.

(See Finding of Fact No. 64 herein.)

23. The Court erred in finding that each and all of the contracts, Exhibits G, G-1, G-2, G-3, F-8, has and have the intended effect of helping TINC and NL to prevent any exports of titanium pigments or compounds to the United States. (See Finding of Fact No. 68 herein.)

24. The Court erred in finding that NL entered into agreement Exhibit E to strengthen the patent monopoly of NL and DP jointly as against newcomers in the titanium pigment business: (See Finding of Fact No. 79-1 herein.)

25. The Court erred in finding that NL refused licenses of the "micronizing apparatus" to VC and Sherwin Williams Company, who desired to use this apparatus: (See Finding of Fact No. 81 herein.)

465 26. The Court erred in finding that the DP-TINC licensing agreements of 1940 and 1941 did restrict and were intended to restrict the use and export of titanium pigments manufactured under any of said patents by purchasers of said pigments. (See Finding of Fact No. 93 herein.)

27. The Court erred in finding that the agreements and understandings entered into between the defendants and other corporations have had the following necessary effect:

(1) The defendant NL has refrained from competing with other titanium pigment producers of the world out-

side the Western Hemisphere and has not exported any titanium pigments or compounds outside the Western Hemisphere unless requested so to do by its foreign associates.

(2) All of the companies engaged in the manufacture of titanium pigments and compounds outside the United States have refrained from importing such pigments or compounds into the United States and have refrained from competing with defendants NL and DP in the United States.

(3) Defendants NL, DP, and TINC, have imposed restrictions on resales by purchasers of titanium pigments.

(4) All competition with foreign producers in the manufacture and sale of titanium pigments and compounds in the United States has been eliminated.

(5) Defendants NL and DP control and dominate the manufacture and sale of titanium pigments and compounds in the United States to the exclusion of all actual or potential competition from any other potential entrant into the titanium pigment business in the United States.

466 (6) Defendants NL and DP secured a monopoly on technical information relating to the manufacture and use of titanium pigments and certain apparatus and equipment necessary to the manufacture of certain titanium pigments to the exclusion and detriment of other producers now engaged in the titanium pigment business in the United States.

(7) Defendants NL, DP and TINC have utilized their patents which relate to the manufacture and use of titanium pigments to control and regulate the manufacture and sale of titanium pigments and compounds in the United States; and NL and TINC with the cooperation of DP have done so throughout the rest of the world.

(8) Defendants NL and TINC in cooperation with the European producers have controlled the production of titanium pigments and compounds throughout the rest of the world outside the United States and refrained from competing with their associated companies in markets allocated to said companies after the outbreak of hostilities in Europe in 1939, serving said allocated markets only at the request of their foreign associates and holding any profits therefrom in the markets so served for the associate to which said exclusive territory was allocated.

(See Finding of Fact No. 95, 1-10 herein.)

28. The Court erred in finding that the intended effects of the acts of the defendants and the other members of the combination will probably continue to the extent that the post-war conditions make possible. (See Finding of Fact No. 96 herein.)

467 29. The Court erred in concluding that beginning on or about July 30, 1920, NL and co-conspirator TAS and on various dates thereafter TINC, DP, and others found herein to be co-conspirators continuing at all times thereafter to the date of these findings have been continuously engaged in a combination and conspiracy in restraint of trade and commerce in titanium pigments and compounds among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements and understandings in restraint of such trade and commerce. (See Conclusion of Law No. 1 herein.)

30. The Court erred in refusing to find that the contracts between NL or TINC and their foreign associates were a reasonable, if not the only, means by which these defendants could participate in foreign business.

WHEREFORE these defendants pray that the Final Decree of the District Court, canceling the agreements to which these defendants were parties, enjoining future acts of the character prescribed by said agreements, compelling these defendants to dispose of their stock holdings in certain foreign companies or, in the alternative, compelling the purchase by these defendants of the entire stock of said companies; and ordering the compulsory licensing of patents on a uniform, reasonable royalty basis, and the furnishing of technical information relating thereto, be reversed, and for such other and fit relief as the Court may deem just and proper.

Dated, December 10, 1945.

Bethuel M. Webster

BETHUEL M. WEBSTER,

Clifton P. Williamson

CLIFTON P. WILLIAMSON,

Attorneys for National Lead Company
and Titan Company, Inc.

468 Bond on appeal for \$250.00 omitted in printing.

471 In United States District Court

[Title omitted.] c

*Petition for appeal, assignment
of errors, and prayer for reversal*

To the Honorable ALFRED C. COXE, Judge of the District Court of the United States for the Southern District of New York:

Your petitioner, defendant E. I. du Pont de Nemours and Company (hereinafter referred to as du Pont), does hereby pray that it be permitted to take an appeal to the Supreme Court of the United States from the Final Decree of this Court, made and entered in the above-entitled cause on October 11, 1945, for the reasons specified in the Assignment of Errors accompanying this petition: that a proper order be made relating to the appeal bond to be given by said petitioner; that a citation issue as provided by law; and that the material parts of the record, proceedings and papers upon which such decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

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ASSIGNMENT OF ERRORS

Defendant du Pont complains that the District Court committed manifest error to the prejudice of said defendant in the above-entitled cause and assigns the following errors in the record and proceedings herein upon which it will rely on its appeal to the Supreme Court of the United States (each numbered paragraph being a separate Assignment of Error):

I. The District Court erred in refusing to dismiss the complaint herein as to said defendant.

II. The District Court erred in ordering, adjudging and decreeing as follows:

(1) That du Pont's agreements with defendants National Lead and Titan Company, Inc. are unlawful, that they be cancelled and that du Pont and all persons acting or claiming to act through or under it and all its successors and subsidiaries be enjoined and restrained from the furtherance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto (Decree, par. 5).

(2) That du Pont and each of its directors, officers, agents, employees, successors and subsidiaries and all persons acting, or claiming to act under, through or for it or any of them be enjoined and restrained (a) from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph 5 of the Decree; (b) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect (1) to divide sales or manufacturing territories, (2) to allocate markets, (3) to limit or prevent United States imports or exports, (4) to grant to any third party any market as its exclusive territory, (5) to keep any third party out of any market; and (c) from restricting any purchaser of titanium pigments in the use thereof (Decree, par. 6).

(3) That du Pont grant to any applicant therefor, including any defendant or co-conspirator, a non-exclusive license under any or all of the patents as defined in the decree at a uniform, reasonable royalty; that during a period of three years from the date of the decree such license may at the option of such applicant contain a provision for the imparting in writing, at a reasonable charge, by du Pont to the applicant, of the methods and processes used by du Pont at the date of its license in its commercial practice under the licensed patents in connection with the production of titanium pigments; and that du Pont be restrained from attempting to enforce any rights under any foreign patents owned by it or under which it is the exclusive licensee to prevent the exportation of titanium pigments from the United States to any foreign country (Decree, par. 7).

(4) That American Zirconium Corporation and the Virginia Chemical Corporation, their successors or assigns, may at their option, if exercised within six months from the date of the Decree, apply for licenses from du Pont under the provisions of paragraph 7 of the Decree; that in the event American Zirconium Corporation and Virginia Chemical Corporation or their respective successors or assigns exercise the foregoing option, du Pont be enjoined from collecting royalties under any existing license agreement relating to titanium pigments between it and

the persons exercising the option in respect of any period subsequent to such exercise; and that du Pont be enjoined from bringing, or threatening to bring, any action against any person or corporation for the alleged infringement prior to the date of the Decree of any patent as defined in the Decree (Decree, par. 9).

(5) That the Attorney General of the United States or his proper representative, for the purpose of securing compliance with the Decree, be permitted (1) access, during du Pont's office hours, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of du Pont, relating to any matters contained in the Decree, 475 and (2) subject to any legally recognized privilege, without restraint or interference from du Pont, to interview its officers or employees regarding any such matters (Decree, par. 10).

(6) That judgment be entered against du Pont for all costs to be taxed in the proceeding (Decree, par. 11).

(7) That jurisdiction of the cause and of du Pont be retained by the District Court for the purpose of enabling any of the parties to the Decree, or any other person or corporation that may hereafter become bound, in whole or in part, thereby to apply to the Court at any time for such further orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of the Decree and (2) for the enforcement of compliance therewith and the punishment for violations thereof (Decree, par. 15).

III. The District Court erred in making findings of fact as follows:

(1) Finding 56 in so far as it finds that DP had knowledge of negotiations between NL and CIL which resulted in the making of four contracts (Pl. Exs. K to K-3 inclusive) and in so far as it finds that du Pont acquiesced in such contracts.

(2) Finding 72 in so far as it finds that DP knew of plans to combine all the European titanium producers and was willing to give its aid to NL in bringing about 476 a patent exchange among the European producers in order to secure one in the United States with NL; that DP had knowledge of the alleged wish of NL to pool with DP all their patents and technical information relating to the manufacture or use of titanium pigments in the United States in order jointly to control and dominate the manufacture and sale of titanium pigments.

and compounds; and that both TP and Krebs began to exchange extensively technical information relating to the manufacture and use of titanium pigments in 1932 and the information so exchanged related to much more than any alleged claims of patent infringement by either company.

(3) Finding 73 in so far as it finds that Krebs and DP, through Rupperecht acquiesced in and ratified the assurance made by Beschorman to IG as to territorial delimitations of the titanium pigment business; that DP's alleged assurance formed in part or otherwise the consideration for continued abstinence of the European producers from exporting to the United States; that DP assured TP and NL that, as a practical matter, such exports by it of titanium pigments into TG's territory would not take place; that DP gave assurances to TP or NL that its conduct would produce substantially identical results as if it agreed to grant NL's foreign associates exclusive licenses under DP's foreign patents; and that DP, through Rupperecht and Krebs, by these assurances and Exhibit E, joined the conspiracy found to exist between NL and its foreign associates.

(4) Finding 79 in so far as it finds that the alleged assurances given by DP were of the character found in Finding 73; that one of DP's purposes in entering into the agreement Ex. E was to strengthen its own patent position in the titanium pigment field to the exclusion of others than NL by pooling its patents with NL; and in so far as it finds that the necessary effects of said agreement and of DP's assurances have been (1) the achievement of NL's purposes, (2) the achievement of DP's purpose to strengthen its own patent position in the titanium pigment field to the exclusion of others than NL by pooling its patents with NL, (3) to give NL and DP together domination and control over the titanium pigment business in the U. S., (4) to remove obstacles from the execution of the TG-Aussig agreement—Ex. G, the Blumenfeld agreements G-1, G-2, G-3, the Japanese agreement Ex. J., the Canadian agreement Ex. K and the price agreement between BTP and Laporte for the British Empire, (5) a proliferation of patents, (6) to restrict and obstruct exports from the U. S. outside the Western Hemisphere, and (7) to restrict and obstruct imports into the U. S.

(5) Finding 84 in so far as it finds that the necessary, or any other, effect of the DP agreement with Zirconium

was to restrict the domestic production and foreign exports of Zirconium.

478 (6) Finding 85 in so far as it finds that the necessary effect of this license was to restrict the production of VC.

(7) Finding 86 in so far as it finds that after the execution of Exhibit E, representatives of DP and NL's foreign associates enjoyed the privilege of visiting each other's titanium pigment plants and obtaining any and all technical information desired by either as regards plant operations and plant equipment from August, 1933, to September, 1938; that this exchange was a courtesy DP and NL's foreign associates expected to receive; that an exchange of technical information was also agreed upon in principle between DP and NL's foreign associates on June 8, 1938; that DP continued agreeable to permit plant visits from the representatives of NL's foreign associates; and that the language of the 1933 agreement does not contain a restriction of the grants to patents 'used'.

(8) Finding 89 in so far as it finds that an oral understanding was reached between DP and NL's foreign associates on June 8, 1938, or any other time, whereby each of said parties agreed to exchange such of its patents and applications as related to the manufacture and use of titanium pigments within the licensed field of Exhibit E with each other as might be desired by each from the other; that such of each other's patents and applications as were
479 desired by DP and NL's foreign associates were to be licensed on a royalty-free basis in separate annual license agreements; that licenses so granted by DP to NL's foreign associates were to be exclusive except as to DP and in England as to ICI; and that Rupprecht expressed to NL and Tine the view that the reservation was in fact without practical importance.

(9) Finding 90 in so far as it finds that there was an oral understanding of June, 1938, or that DP acted in accordance therewith.

(10) Finding 93.

(11) Findings 95 and 96 in so far as said findings refer to du Pont or ascribe the specified effects to any agreements, understandings, or other actions of DP.

IV. The District Court erred in failing and refusing to make findings of fact, as follows:

(1) That du Pont has not exported titanium pigments in substantial quantities solely because of its own independent judgment as to the business undesirability of so doing made

in the light of a number of economic, political and legal factors operating adversely to such exports.

(2) That du Pont did not assure National Lead Company prior to the execution of Exhibit E or at any other time, that it would not export titanium pigments outside the United States.

480 (3) That du Pont's exchange of technical information with National Lead Company pursuant to the provisions of Exhibit E progressively deteriorated until eliminated at du Pont's request as of May 1, 1940.

(4) That du Pont entered into a written agreement with National Lead Company (Exhibit E), dated as of January 1, 1933; that du Pont and National Lead Company by a written agreement (Exhibit E-3), dated as of January 1, 1941, amended the agreement between the parties of January 1, 1933, in certain respects; and that each of such written agreements embodied the full and complete understanding between the parties.

(5) That du Pont did not agree with National Lead Company or Titan Company, Inc. in or about June, 1938, or at any other time, to give Titan Company, Inc. at its request, exclusive licenses to manufacture and sell under all patents which du Pont then owned or might thereafter acquire relating to the manufacture and sale of titanium pigments for the territory in which Titan Company, Inc. operated, or any of them.

(6) That du Pont did not agree with National Lead Company or Titan Company, Inc. in or about June, 1938, or at any other time, that du Pont would not exercise rights reserved to it in licenses granted to the Titan Company, Inc.

(7) That du Pont did not at any time agree to exchange technical information with the foreign associates of National Lead.

481 (8) That du Pont did not enforce the quantity limitations formerly contained in the separate license agreements made by it with American Zirconium Corporation and Virginia Chemical Corporation and that such provisions have not in fact limited the production of either of such companies or prevented them from engaging in the manufacture and sale of titanium pigments on a commercially profitable basis.

V. The District Court erred in receiving in evidence, as against du Pont, and in refusing to strike, as not connected to du Pont:

(1) A letter, dated July 12, 1933, from W. C. Beschorman, Vice-President of National Lead Company, to I. G. Farbenindustrie. (Part of Plaintiff's Exhibit 273).

(2) All other written statements contained in any letters or memoranda which were not written by or on behalf of du Pont or in any agreements to which du Pont was not a party, and all oral statements made in any conversation at which du Pont was not represented.

VI. The District Court erred in holding and making conclusions of law as follows:

(1) That du Pont, among others, violated Section 1 of the Sherman Act (Conclusion 1).

(2) That plaintiff is entitled to a decree as to du Pont (Conclusion 2).

VII. The District Court erred in failing and refusing to hold and conclude as follows:

(1) That du Pont did not contract, combine, or conspire, to restrain trade or commerce in titanium pigments or compounds among the several States, or with foreign nations, in violation of Section 1 of the Sherman Act.

482 (2) That the complaint herein should be dismissed as to du Pont.

PRAYER FOR REVERSAL

Wherefore, your petitioner prays that the said decree of this Court, made and entered October 11, 1945, in the above-entitled cause, be reversed and that the complaint herein be dismissed as against said petitioner and for such other and further relief as to the Court may seem just and proper.

December 10, 1945.

CHAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.
Attorneys for defendant.

E. I. du Pont de Nemours and Company.

ALBERT R. CONNELLY,

Of Counsel.

483 In United States District Court

[Title omitted.]

Order allowing appeal

Defendant E. I. du Pont de Nemours and Company having made and filed its Petition for Appeal, praying for

an appeal to the Supreme Court of the United States from the Final Decree of this Court, made and entered in the above-entitled cause on October 11, 1945, and having also made and filed its Assignment of Errors, Prayer for Reversal and its statement as to Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered that the appeal be, and the same hereby is, allowed as prayed for, and that an appeal bond in the sum of \$500.00 be filed by or on behalf of said defendant, with good and sufficient surety.

Dated: December 10th, 1945.

ALFRED C. COXE,
U. S. District Judge.

484 Bond on appeal for \$500 omitted in printing.

487 In United States District Court

[Title omitted.]

Præcipe for transcript of record

*To the Clerk of the United States District Court
for the Southern District of New York:*

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause on behalf of the United States of America, and to include in such transcript of record the following:

1. Plaintiff's complaint.
2. Answers of the defendants National Lead Company, Titan Company, Inc. and E. I. du Pont de Nemours and Company, Inc.
3. Plaintiff's exhibits A, A-1, A-2, B, C, C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9, D, D-1, E, E-3, F, F-1, F-2, F-3, F-4, F-5, F-6, F-7, F-8, G, G-1, G-2, G-3, H, I, J, J-1, J-2, J-3, J-4, J-5, J-6, K, K-1, K-2, K-3, K-4, K-5, K-6, L, M, N, O, P, P-1, P-2, Q, R, and S.
4. Draft of decree proposed by the Government and submitted to the Court on September 15, 1945.
5. That part of the transcript of the record beginning on page 82 and commencing with the words "Now we come to the question of relief" and ending on the top of page 86 with the remark by the Court, "We will take a short recess."

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6. That part of the transcript of the record beginning at the bottom of page 3745 with the remark of the Court, "Now we go to the decree," to the middle of page 3799 ending with the words "Somewhere in the Russian territory," and commencing with the words of Mr. Dixon in the middle of page 3845, "Yes, Your Honor," and ending with the words of the Court on page 3889 "which has crystalized a number of issues in my mind."

7. Opinion of the District Court filed on July 5, 1945.

8. Findings of Fact and Conclusions of Law filed by the District Court on October 2, 1945.

9. Final decree filed by the District Court on October 11, 1945.

10. Plaintiff-appellant's petition for appeal.

11. Plaintiff-appellant's assignment of errors.

12. Jurisdictional statement filed by plaintiff-appellant.

13. Order allowing appeal of plaintiff-appellant.

14. Citation on appeal of plaintiff-appellant.

15. Statement of plaintiff-appellant calling attention to the provisions of Supreme Court Rule 12(3).

16. Proof of service filed by plaintiff-appellant.

17. This praecipe and service thereof.

Said transcript is to be prepared as required by law and the Rules of this Court and Rules of the
489 Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: December 29, 1945.

WILLIAM C. DIXON,
Attorney for Plaintiff.

WILLIAM C. DIXON,
Special Assistant to the Attorney General.

Service of the above praecipe is accepted and copy thereof received this 7th day of January 1946.

CLIFTON P. WILLIAMSON,
BETHUEL M. WEBSTER,
Attorneys for Defendants,

National Lead Company and Titan Company, Inc.

CRAVATH, SWAINE & MOORE,
Attorney for Defendant,
Du Pont de Nemours and Company, Inc.

490

In United States District Court

[Title omitted.]

COUNTER-PRAECIPE

To the Clerk of the United States District Court:

In addition to portions of the record indicated for incorporation into the transcript of record in defendant E. I. du Pont Nemours and Company's Counter Praecipe and Praecipe dated and served January 14, 1946, please incorporate into the transcript of record the following and certify the same to the Supreme Court of the United States:

1. That part of the transcript of the record beginning on page 2090 with "Mr. Dixon: Your Honor, I might say, etc.," through, "The Court: . . . you might say it is purely surplusage, perhaps, very likely," on page 2091.

2. That part of the transcript of the record beginning on page 2326 with "Mr. Dixon: . . . Your Honor, I think, etc.," through "Mr. Whitney: Right, your Honor. Then we have no further objection on the ground of competence," on page 2326.

3. That part of the transcript of the record beginning on page 2373 with "Mr. Dixon: Before I take that up, your Honor," etc., through "Mr. Whitney: Other than what you already took from our files," on page 2373.

491 4. This praecipe and proof of service thereof.

Date: January 24, 1946.

WILLIAM C. DIXON,
Attorney for Plaintiff.

WILLIAM C. DIXON,
Special Assistant to the Attorney General.

Service of the above counter-praecipe is accepted and copy thereof received this 24th day of January 1946.

CLIFTON P. WILLIAMSON,
BETHUEL M. WEBSTER,
Attorneys for Defendants,
National Lead Company and Titan Company, Inc.

CRAVATH, SWAIN & MOORE,
Attorney for Defendant,
E. I. du Pont de Nemours and Company, Inc.

492 In United States District Court

[Title omitted.]

*Praeipie for transcript of record**To the Clerk of the United States District Court:*

Please prepare a transcript of the record in the above entitled cause in the matter of the appeal of National Lead Company and Titan Company, Inc. herein, and include in said transcript the following papers:

1. Bill of Complaint.

2. Answer of each defendant to the Bill of Complaint.

3. Official record of the stenographic minutes before the Hon. Simon H. Rifkind, United States District Judge, Southern District of New York, containing the transcript of testimony of the following witnesses: Blumenfeld, pp. 2501-2591; Jebson, pp. 2808-3067; Kaegebehn, pp. 133-177, 2601-2617, 2748-2807; Barton, pp. 2693-2747; Rockwell, pp. 3126-3187a; Corddry, pp. 2592-2600, 3067-3114; Daley, pp. 3343-3381; de Vegh, pp. 3188-3250.

4. The following exhibits:

[a] A, A-1, A-2, B, B-1, B-3, B-4, C, C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9, D, D-1, D-2, E, E-1, E-2, E-3, F, F-1, F-2, F-3, F-4, F-5, F-6, F-7, F-8, G, 493 G-1, G-2, G-3, H, H-1, H-2, I, I-1, J, J-1, J-2, J-3, J-4, J-5, J-6, J-7, J-8, K, K-1, K-2, K-3, K-4, K-5, L, M, N, O, P, P-1, P-2, Q, R, S;

[b] NL2, NL3, NL4, NL5, NL6, NL7, NL33, NL34.

5. Proposed Findings of Fact and Conclusions of Law of defendants National Lead Company and Titan Company, Inc., dated March 1, 1945.

6. Opinion of Hon. Simon H. Rifkind, United States District Judge, Southern District of New York, dated July 5, 1945.

7. Findings of Fact and Conclusions of Law filed October 2, 1945.

8. Plaintiff's proposed Final Decree.

9. Official record of stenographic minutes containing transcript of proceedings before the Hon. Simon H. Rifkind, United States District Judge, Southern District of New York of October 1 and 2, 1945.

10. Final Decree dated October 11, 1945.

11. Appeal papers of National Lead Company and Titan Company, Inc.

(a) Petition for Appeal.

- (b) Assignment of Errors and Prayer for Reversal.
- (c) Order Allowing Appeal.
- (d) Appeal Bond.
- (e) Proof of Service.
- (f) Statement required by Rule 12 of the Supreme Court Rules.
- (g) Citation.
- 494 (h) Statement of Jurisdiction.
- (i) This Praecipe.

Dated, January 5, 1946.

CLIFTON P. WILLIAMSON,
BETHUEL M. WEBSTER,
*Attorneys for National Lead Company
and Titan Company, Inc.*

Copy received Jan. 5, 1946.

WILLIAM C. DIXON,
Special Asst. to Attorney General.

495 In United States District Court

[Title omitted.]

Counter praecipe.

To The Clerk of the United States District Court:

In addition to portions of the record indicated for incorporation into the Transcript of Record in the Plaintiff-Appellants' Praecipe dated December 29, 1945 and served January 7, 1946, please incorporate into the Transcript of Record the following and certify the same to the Supreme Court of the United States.

1. Official record of the stenographic minutes before the Hon. Simon H. Rifkind, United States District Judge, Southern District of New York, containing the transcript of testimony of the following witnesses: Blumenfeld, pp. 2501-2591; Jebson, pp. 2808-3067; Kaegebehn, pp. 133-177, 2308-2310, 2325-2326, 2343-2373, 2601-2617, 2748-2807; Barton, pp. 2693-2747; Rockwell, pp. 3126-3187a; Corddry, pp. 2592-2600, 3067-3114; Daley, pp. 3343-3381; de Vegh, pp. 3188-3250.

2. The following exhibits:

[a] B-1, B-3, B-4, D-2, E-1, E-2, H-1, H-2, I-1, J-7, J-8.

[b] NL2, NL3, NL4, NL5, NL6, NL7, NL33, NL34.

496 3. Proposed Findings of Fact and Conclusions of Law of defendants National Lead Company and Titan Company, Inc., dated March 1, 1945.

4. Official record of stenographic minutes containing entire transcript of proceedings before the Hon. Simon H. Rifkind, United States District Judge, Southern District of New York of October 1 and 2, 1945 (pp. 3713-3907).

5. Appeal papers of National Lead Company and Titan Company, Inc.

(a) Petition for Appeal.

(b) Assignment of Errors and Prayer for Reversal.

(c) Order Allowing Appeal.

(d) Appeal Bond.

(e) Proof of Service.

(f) Statement required by Rule 12 of the Supreme Court Rules.

(g) Citation.

(h) Statement of Jurisdiction.

(i) Praecipe.

(j) This Counter Praecipe.

Dated, January 15, 1946.

CLIFTON P. WILLIAMSON,

BETHUEL M. WEBSTER,

*Attorneys for National Lead Company
and Titan Company, Inc.*

Copy received Jan. 15, 1946.

WILLIAM C. DIXON,

Special Asst. to Attorney General.

497 In United States District Court

[Title omitted.]

*Counter praecipe and praecipe for transcript
of record*

To the Clerk of the above-named Court:

In connection with preparation of the transcript of record on the appeals herein, E. I. duPont de Nemours and Company (hereinafter referred to as duPont) requests that you prepare and include as part of such transcript the following and certify the same to the Supreme Court of the United States:

1. All pleadings, including specifically

(a) Complaint filed June 24, 1944,

(b) Answer of National Lead Company and Titan Company, Inc., dated September 15, 1944,

(c) Answer of du Pont, dated September 15, 1944,

(d) Supplemental Answer of du Pont, dated December 4, 1944.

2. All exhibits admitted at the trial, including those marked as Plaintiff's Exhibits A through S and 1 through 1229; National Lead's Exhibits 1 through 34; and du Pont's Exhibits 1 through 97.

3. The following portions of the Stenographic Minutes of the trial:

A. Testimony of all witnesses, being:

(1) Kaegebehn, pp. 133-177, 2308-2310, 2325-2326, 2343-2373, 2601-2617, 2748-2807.

(2) Fowler, pp. 1503-1511 a.

(3) Ewing, pp. 1512-1528.

(4) Blumenfeld, pp. 2501-2591.

(5) Corddry, pp. 2592-2600, 3067-3114.

(6) Pitts, pp. 2618-2623.

(7) Barton, pp. 2693-2747.

(8) Jebson, pp. 2808-3067.

(9) Rockwell, pp. 3126-3187 a.

(10) de Vegh, pp. 3188-3250.

(11) Daley, pp. 3343-3381.

B. All proceedings on the following days except as otherwise noted:

(1) December 4, 1944, pp. 1-121 other than opening statements of counsel appearing at pp. 12-120.

(2) December 5, 1944, pp. 122-228.

(3) December 6, 1944, pp. 229-338.

(4) December 7, 1944, pp. 339-465.

(5) December 11, 1944, pp. 466-577.

(6) December 12, 1944, pp. 578-697 a.

(7) December 13, 1944, pp. 698-816.

499 C. The following proceedings on the following days:

(1) December 14, 1944.

(a) Beginning with top of p. 817 through "The COURT. Very well. It will be so deemed" on p. 818.

(b) Beginning with "Exhibit 170" on p. 893 through "Mr. WEBSTER. Yes" on p. 894.

(c) Beginning with "Mr. WEBSTER. I understand, etc." on p. 903 through "The COURT. . . . moving in behind a shield all the time" on p. 903.

(2) December 18, 1944.

(a) Beginning with "Mr. Dixon. We would now like etc." on p. 1076 through "The COURT. It is so stipulated" on p. 1076.

(3) December 19, 1944.

(a) Beginning with "The COURT. 2261" on p. 1208 through "Mr. WHITNEY. Correct" on p. 1209.

(4) December 21, 1944.

(a) Beginning with "The COURT. Why don't you etc." on p. 1429 through "Mr. WHITNEY. . . . so I will subside and come back to the other later for only a few minutes" on p. 1430.

500 (b) Beginning with "The COURT. Exhibit 271" on p. 1435 through "The COURT. I understand that" on p. 1436.

(1) Beginning with "The COURT. 278" on p. 1467 through "The COURT. The objection is good and it is sustained" on p. 1468.

(5) January 2, 1945.

(a) Beginning with "Mr. CAPLAN. The next group etc." on p. 1577 through "Mr. CAPLAN. Yes, that is right" on p. 1578.

(6) January 16, 1945.

(a) Beginning with "Mr. DIXON. This next Exhibit 710 etc." on p. 2086 through "The COURT. All right" on p. 2090.

(b) Beginning with "Mr. DIXON. Exhibit 828 etc." on p. 2124 through "The COURT. Mr. Dixon assents to that comment" on p. 2129.

(7) January 18, 1945.

(a) Beginning with "Mr. DIXON. Exhibit 882 etc." on p. 2319 through "Mr. WEBSTER. I think that is the solution and I hoped the Government would do that" on p. 2325.

(b) Beginning with "Mr. DIXON. Exhibit 887 is a memorandum etc." on p. 2342 through "Mr. DIXON. 501 Mr. Kaegbehn, will you give us the pleasure of your presence on the stand for a moment!" on p. 2343.

(8) January 26, 1945.

(a) Beginning with "Mr. WEBSTER. May I interrupt etc." on p. 3096 through "Mr. WEBSTER. That is all, your Honor" on p. 3097.

(9) January 30, 1945.

(a) Beginning with "Mr. WHITNEY. I think Mr. Dixon etc." on p. 3252 through "(21) The matters agreed to herein are for purposes of this action only" on p. 3262.

(10) February 5, 1945.

(a) Beginning with "The COURT. What page is Exhibit 1229 on?" on p. 3388 through "Mr. DIXON. Obviously, we

are not interested in having them printed in full" on p. 3393.

D. All proceedings on October 1 and 2, 1945, pp. 3712-3907.

4. Stipulation dated October 1, 1945, relating to sales of titanium pigments in Canada.

5. District Court's opinion filed July 5, 1945.

6. Plaintiff's proposed Findings of Fact dated March 1, 1945.

7. Proposed Findings of Fact and Conclusions of Law on behalf of du Pont dated March 1, 1945.

502 8. District Court's Findings of Fact and Conclusions of Law filed October 2, 1945.

9. Plaintiff's proposed Decree submitted on or about September 15, 1945.

10. District Court's Final Decree filed October 11, 1945.

11. Du Pont's appeal papers, all dated December 10, 1945, being:

(a) Petition for Appeal, Assignment of Errors and Prayer for Reversal,

(b) Statement as to Jurisdiction,

(c) Appeal Bond,

(d) Order Allowing Appeal,

(e) Citation on Appeal,

(f) Notice calling attention to the provisions of Supreme Court Rule 12(3),

(g) Proof of Service.

12. This Praecipe and proof of service thereof.

January 14, 1946.

CRAYATH, SWAINE & MOORE,

By WM. DWIGHT WHITNEY,

A member of said firm.

*Attorneys for E. I. du Pont de Nemours
and Company,*

15 Broad Street, New York 5, N. Y.

ACKNOWLEDGMENT OF SERVICE

Service of copies of the foregoing Praecipe is acknowledged this 14th day of January 1946.

LAWRENCE S. AFSEY,

United States of America.

503 [Citations in usual form, filed Dec. 10, 1945, omitted in printing.]

509

In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April 17, 1946.

WILLIAM C. DIXON,

Attorney for the United States of America.

CLIFTON P. WILLIAMSON,

BETHUEL M. WEBSTER,

Attorneys for National Lead Company and Titan Company, Inc.

CRAVATH, SWAINE & MOORE,

Attorneys for E. I. du Pont de Nemours and Company.

510

[Clerk's certificate to foregoing transcript omitted in printing.]

511

In United States District Court

[Title omitted.]

Stipulation as to certain exhibits

Filed April 17, 1946

It is stipulated that Plaintiff's Exhibits 1, 2, 3, 4, 5, 24, 25, 26, 42, 43, 44, 450 through 468, 473, 474, the last two attachments of Exhibit 177 (labeled on their face as "Exhibit S" and "Exhibit T"), the last two attachments of Exhibit 600, 1229, NL Exhibits 8 through 22 and DP Exhibit 97 shall not be printed as a part of the record on the appeals to the Supreme Court of the United States. One copy of each of said Exhibits shall be available in, and on file at, the Office of the Clerk of said Court. They shall be a part of the record for all purposes.

Dated April 16, 1946.

WILLIAM C. DIXON,

Attorney for Plaintiff.

CLIFTON P. WILLIAMSON,

BETHUEL M. WEBSTER,

*Attorneys for Defendants,**National Lead Company and Titan Company, Inc.*

CRAVATH, SWAINE & MOORE,

*Attorneys for Defendant,**E. I. du Pont de Nemours and Company.*

1 In United States District Court, Southern
District of New York

Civ. 26-258

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NATIONAL LEAD COMPANY, TITAN COMPANY, INC., E. I. DU
PONT DE NEMOURS AND COMPANY, DEFENDANTS

Before Hon. SIMON H. RIFKIND, District Judge.

NEW YORK, December 4, 1944, 10:30 a.m.

Appearances

John F. X. McGohey, Esq., United States Attorney for
the Government; Herbert A. Berman, Esq., William C.
Dixon, Esq., Russell E. Locke, Esq., Special Assistants to
the Attorney General, Julian Caplan, Esq., and Ephraim
Jacobs, Esq., Special Attorneys, of Counsel. Bethuel M.
Webster, Esq., and Clifton P. Williamson, Esq., Attorneys
for National Lead Company and Titan Company, Inc.;
Bethuel M. Webster, Esq., Clifton P. Williamson, Esq.,
Edward L. Rea, and Carolinda Waters, Esq., of Counsel.
Cravath, Swaine & Moore, Esqrs., Attorneys for E. I.
du Pont de Nemours and Company; William Dwight Whit-
ney, Esq., John Logan O'Donnell, Esq., and Gerhard A.
Gesell, Esq., of Counsel.

2 The COURT. There were some stipulations the
clerk told me about that I have not looked at. Are
they to be disposed of before the commencement of the
trial?

Mr. DIXON. I believe counsel for the Government and the
defendants have agreed upon a stipulation with regard to
certain rules which might otherwise be applicable to the
admission of documents, and subject to the approval of
the Court we have agreed to this stipulation.

The COURT. Very well. As soon as we commence the
actual receipt of evidence you will read it into the record
or submit it for signature and we will pass on them at
that time.

Mr. WHITNEY. I would like to move for leave to serve
a supplemental answer. It is only one paragraph and re-
cites an intervening occurrence, to wit, a modification of
license agreements.

The COURT. Have you shown it to your adversary?

Mr. WHITNEY. I think we have.

Mr. DIXON. This is the first time I have seen it.

Mr. WHITNEY. We served it this morning. There is no hurry.

The COURT. Is there any objection to it?

Mr. DIXON. I think we have no objection to it.

3 The COURT. Is there any objection from any other parties?

Mr. WEBSTER. None.

The COURT. Very well. The supplemental answer will be received.

Mr. WHITNEY. If your Honor please, we have presumed to put up on your desk two printed documents, the first of which, printed documents, your Honor, is a copy of the Government's complaint that the defendant reprinted for convenience, following the same page numbering as the typewritten copy and the same lining page for page and line for line, and also a copy of a brief trial memorandum on behalf of du Pont.

The COURT. Have you delivered a copy of your trial memorandum to your adversaries?

Mr. WHITNEY. Yes, indeed.

The COURT. I have also received a copy of a memorandum from the Government, entitled "Trial Memorandum No. 1." Has that been served upon the defendants?

Mr. WEBSTER. Yes, it has, your Honor.

The COURT. I ask the question, because although the rules of the court do not require it, I follow the practice of requiring the service of trial memoranda upon adversaries.

Now let me see if I can get myself introduced.

4 Who is going to actually try the case for the Government?

Mr. DIXON. Mr. Locke and myself will conduct principally the examination of witnesses and the trial for the Government.

The COURT. Now for the National Lead Company.

Mr. WEBSTER. If your Honor please, Mr. Williamson and I appear for the National Lead Company, and my associate, Mr. Rea, is not here just now, but will be shortly, and Miss Waters, who is associated with us.

The COURT. I want to know who is going to take the laboring oar.

Mr. WEBSTER. I am going to take the lead.

The COURT. Now for Cravath, Swaine & Moore.

Mr. WHITNEY. I expect the laboring oar will fall upon me, your Honor, and Mr. Gesell, who has come from Washington. May I move, your Honor, that he be admitted pro hac vice.

The COURT. I will be glad to grant that. Mr. Gesell is a member of the District of Columbia bar?

Mr. WHITNEY. Yes, your Honor.

Mr. WEBSTER. May it please the Court, there is one preliminary matter. On October 30th, at an informal conference with your Honor, I presented to the Court a statement on behalf of National Lead Company 4-A concerning certain contracts referred to in the complaint. Your Honor suggested that I bring it to his attention on the opening of the trial, and I now do that. I have a copy of it here with an endorsement concerning the conference with your Honor, and I ask to have that copied into the record.

The COURT. Very well. Is there any objection to that?

5 Mr. DIXON. Your Honor, we do object to it. We do not feel, from what we saw at that time, that it was at all competent as evidence to be considered by the Court.

The COURT. Well, I do not take it as evidence, and in view of the objection I will receive it as a trial memorandum or in the nature of a trial memorandum.

Mr. DIXON. That is all right.

The COURT. I will receive it therefore but it won't be incorporated into the record.

Mr. WEBSTER. May I have it marked, or can it be copied into the record for the purpose of convenience, so that we will have it before us?

The COURT. No, any more than you could have the complaint copied in the record.

Mr. WEBSTER. Perhaps I should have it marked for identification.

The COURT. If you want it marked for identification, of course there is no objection, and you can do it now, for that matter, if you wish.

Mr. WEBSTER. In view of the different defendants here it might be well for convenience to call this NL Exhibit 1 for identification.

The COURT. National Lead?

Mr. WEBSTER. National Lead.

The COURT. All right, the clerk will do that.

6 Mr. WEBSTER. I think NL will take care of any exhibit relating to Titan Company and then there can be a separate identification for du Pont.

The COURT. Then we will call that 1. We can mark the Government's exhibits with just a numeral.

(Marked Exhibit NL for identification.)

Mr. DIXON. I might say to your Honor with regard to exhibits that the Government has in mind introducing contracts under A, B and C, and all other exhibits will be numerical.

The COURT. Now, Mr. Dixon, do you propose to open, or do you propose to proceed with the taking of testimony?

Mr. WEBSTER. Your Honor, I had one other matter, if I may interrupt again.

We have prepared some informal memoranda of law. I had first intended to hand these up to your Honor one by one, but I see no reason why I should not give the ones that are now ready to your Honor at present and serve copies on my adversary.

The COURT. Very well. I will take it.

Mr. WEBSTER. These are not in the nature of briefs; they are rather simple statements of the law as we consider may arise in the trial in the case.

The COURT. Am I correct, Mr. Webster, that I can assume all of the memoranda for National Lead are also available for Titan?

Mr. WEBSTER. Yes. You may assume that, your Honor, until the difference clearly appears, that is, until it is pointed out.

The COURT. Very well. Let me say a word about the time schedule. I understand this case is going to be prolonged for quite a while. I had some impression upon that during the last conference we had. As far as daily schedules are concerned, we will begin at 10.30 and we will have a recess at 11.30; we will have a luncheon recess at 1 to 2.15, and we will have a short recess at 3.30, and adjourn at 4.30. I make the announcement so that you will know when you will be free to do whatever you may choose to do.

For a short while I may be able to run only on a four-day schedule, and I will submit it to you gentlemen to tell me whether you would rather have the lost day occur on Wednesday or Friday. It is all a matter of indifference to me. It is a question of doing some things that I have to dispose of.

Mr. WHITNEY. If your Honor please, I have so many associates from out of town that we would be agreeable if it could be Friday. The associates are from Washington and Wilmington.

8 Mr. DIXON. That will be agreeable to the Government, your Honor.

Mr. WEBSTER. That is agreeable to National Lead.

The COURT. Very well. In the event I have to notify you to the contrary I will give you several days' notice so that you will be aware of the change. I will operate on a four day schedule skipping Friday of each week, but I don't think that that should last beyond the Christmas season. It will probably stop this side of the Christmas season, I hope.

Mr. DIXON. Your Honor may recall that when we had an informal conference about a month or so ago in your chambers we suggested that subject to the approval of the Court we would appreciate having an extra day or so around the Christmas season. The reason for that, from my own point of view, is that we would like if possible to take those few days to be with our families. Subject to the approval of the Court at this time, I am wondering whether it would be agreeable to the Court and counsel to adjourn, I mean recess, during that period until at least Wednesday or Thursday of that week of Christmas week.

The COURT. What is the date you have in mind, so that you will be able to make your plans? Travel accommodations are scarce these days and you want to know in
9 advance of when that will be.

Mr. WHITNEY. Christmas Day is Monday, your Honor.

The COURT. When do you want to adjourn, Mr. Dixon?

Mr. DIXON. As I understand your Honor's schedule, we adjourn on Friday unless we are going by the previous schedule which means that it would be Thursday, prior to Christmas. So that personally, and speaking only for myself, I would appreciate not having to return until Thursday, if possible, of the following week. That will be the 28th, I believe.

The COURT. Have you any views on that?

Mr. WHITNEY. We support that enthusiastically, your Honor, in behalf of my Washington and Wilmington associates.

The COURT. Do you agree to that, Mr. Webster?

Mr. WEBSTER. Yes.

The COURT. Very well then. Let us make it definite now.

We will adjourn at the close of the day on Thursday, the 21st and resume on Thursday the 28th.

Now for my personal convenience I should like to make a suggestion, unless you gentlemen have worked out some other scheme. I read the pleadings, and on first reading one become a little overwhelmed with the large number of names, many of which are somewhat similar. So

10 I have worked out a numerical scheme for these various corporations named in the complaint, and I have adopted these numbers. Now, you don't have to write them down, for this reason: I have assigned to each corporation the paragraph number in the complaint in which that corporation is described. That gives you the first corporation as No. 2, and the last corporation as No. 24, but there is no number 20. So, I have found myself identifying them by number very conveniently, in having a printed index to the names of the corporations, by referring to the paragraph numbers of the complaint.

If you find that that is a convenient tool in avoiding confusion as to Titanium Products and Titanium Company and Japanese corporation whose names sound similar to me, you may use that. I am going to use that as far as I can, and I will try as the case goes on to actually identify them in my mind by these numerical symbols.

Mr. WEBSTER. Your Honor, there are come interesting possibilities when some of those numbers are put together.

The COURT: Yes. I also understood from the Government's brief, which I glanced at this morning that there were 11 contracts which would form the matrix of this controversy, and because of the order in which they

11 appear in Government's memorandum No. 1 I have numbered them 1 to 11 by Roman numerals, and I can readily see myself working out a chart in which I have Arabic-numbered corporations assigned to various Roman-numeral contracts. Perhaps we can do some numerology on that basis.

Mr. LOCKE. Could I offer a suggestion apropos of that?

The COURT. Yes.

Mr. LOCKE. In our exhibits and in references that we will make from time to time, as Mr. Dixon has pointed out, we have identified those contracts with letters, A, B, and C.

The COURT. Then I will switch to letters.

Mr. LOCKE. I think perhaps it would be more convenient and more efficient if the Court used letters instead of Roman numerals.

The COURT. Very good.

Mr. LOCKE. Might I also say that, if there are some methods of working with this, the Government has got in the habit of referring to these various corporations in abbreviated style. For instance, National Lead is NL and du Pont is DP.

The COURT. You may continue to do that. I have no objection to that.

Mr. LOCKE. We propose to give the Court a
12 schedule of those abbreviations with the proper
names set opposite them. Now we will include the
paragraph numbers so that the Court will have a model
or scale.

The COURT. That will be very convenient.

Mr. Dixon, is it your intention to open or is it your intention to proceed with the taking of the testimony?

Mr. Dixon. It is our intention, your Honor, to make an opening statement.

The COURT. Very well, I will hear you.

82 Now we come to the question of the relief re-
83 quested by the Government in this case. It is the
contention of the Government that all of the mem-
bers of this combination who have engaged in it and a part
of it, enjoyed the benefits of it, have been able to do so
because of these agreements and understandings and the
various reciprocal things which have been effected between
the parties, and that as the result of those things in their
territories, as in the United States, by reason of the pooling
of the patents between the defendants du Pont and Na-
tional Lead, not only present but future patents, they have
been able to dominate the titanium pigment industry in the
United States, and of course in all the other countries of
the world where the co-conspirators are operating; and
that everything which goes along with the domination, the
evils of it, some of which we have referred to and others
of which we will show during the course of the evidence,
are present.

We feel, therefore, and have asked this Court in grant-
ing relief to the Government to provide for compulsory
royalty-free licenses on existing patents which will be made
available to anyone now in the industry or who may desire
to enter the industry. In addition to that, we of course are
asking for the cancellation of these contracts and the under-
standings.

84 The COURT. What is the difference between
compulsory licensing on a royalty-free basis and
complete nullification of the patents themselves?

Mr. Dixon. The patents are still available to the patentee, your Honor, and we haven't any definite plan; we believe that should await the outcome of hearings to be had by the Court on all of the patents themselves.

The COURT. You misconstrue my question. I don't mean that you should tell me now why you want one or the other. I want to know what is the difference between one or the other.

Mr. Dixon. In effect we might say there is no difference. We contend that the defendants, the combination here in the United States, du Pont and National, have enjoyed the benefits of those patents by reason of the exchanges arising out of the agreement and that otherwise they might be paying a license to each other for them. They have been able to build up their business on a royalty-free license basis. By that I mean they have exchanged them. Under their license agreement they are obligated to do so. We are now asking, in considering the relief which may ultimately be granted in this case, that that same advantage be made available to others in the industry or to anyone who wants to enter the industry. However, that may be for a fixed time or
85 on such terms as the Court may determine.

We also ask this Court in considering relief to provide for the compulsory granting of technical information to anyone in the industry or anyone who may enter the industry of the kind and type that has been exchanged between the defendants and co-conspirators in this combination.

We also may ask the Court to consider the possibility of compulsory licensing or future patents for a limited time at a reasonable royalty and the possible divestiture of some of the manufacturing units of the defendants in this country. In other words, the final and ultimate relief which we will ask the Court to grant in this case will be based upon the consideration that the defendants not be permitted to enjoy the benefits of the fruits of their combination and that the present two other companies in the case and any new capital that may care to enter into this business can do so on a basis of an open, free and competitive market which cannot and is not dominated by the defendants as is shown or as we expect the evidence to show in this case.

And we would ask in closing, as far as relief is concerned, the right to present a plan which will be equitable and which will accomplish the purposes that we have

86 referred to, which are we believe the purposes clearly stated by the provisions of the Sherman Antitrust Act which we charge the defendants with having violated in the instant case.

The COURT. We will take a short recess.

(Short recess.)

120 The COURT. One final word, gentlemen, and then

I will keep to my contract and let you go at four-thirty. I have a habit occasionally of asking questions. I have been misunderstood a number of times in the motion part and other places and then I get a brief which says that I have held so and so or laid out the law to be so and so, frequently attributing to me propositions of law that I would never think of laying down. Asking questions is just a way of eliciting information. Maybe it is not the happiest way. Maybe there is some other way, but I do not pretend to indicate the law until I have had a chance to study it, or give my view of the facts or have had a chance to evaluate the facts,

121 and if by hypothesis I suggest a fact, don't let counsel go back and loosen his sleeves and let me have a memorandum to read the following day. It is only tentative and suggestive and designed to help me grasp all the facts.

Mr. Dixon. May it please the Court, in view of counsel's remarks about his position on the introduction of evidence, we have prepared and would like to submit to your Honor in case you care to read it at your convenience, a memorandum with regard to the conspiracy law generally and the principles applicable to it.

The COURT. I will take it if you give your adversaries a copy.

Mr. Dixon. I do not suggest necessarily that you read it now but we are giving it to you at this time.

The COURT. We will adjourn then until ten-thirty tomorrow.

(Adjourned until Tuesday, December 5, 1944, at 10:30 a.m.)

122

UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, December 5, 1944, 10:30 a.m.

Trial resumed.

Mr. WINTER. If the Court please, reference was made

yesterday afternoon to an article in Harper's Magazine. I have a copy of it here and I would like to give it to the clerk and ask him to please give it to the Court. I will also serve a copy on my adversary if there is any occasion to do so.

The COURT. No, you don't have to do that.

Mr. DIXON. May it please the Court, I wish to state at this time that counsel for the Government and each of the defendants have agreed upon having each one of the defendants represented by someone and someone from the Government to discuss and consider any possible corrections to the record each day, subject to the approval of the Court.

The COURT. All right. You may proceed.

Mr. LOCKE. If the Court please, the parties to this proceeding have after a number of conferences agreed on a stipulation that has to do with such documentary evidence as any of the parties will introduce or attempt to introduce in this case. I should like to read this stipulation to the Court because we are going to ask the Court to approve it.

With respect to the defendant du Pont, this stipulation has been signed by the attorneys for the respective parties. It reads:

Stipulation

"It is hereby stipulated between plaintiff United States of America (hereinafter sometimes referred to as the Government) and defendant E. I. du Pont de Nemours and Company, Inc. (hereinafter sometimes referred to as du Pont), by their respective attorneys:

"1. The Government and du Pont each waives its right to object to the introduction into evidence of any contract, agreement, letter, memorandum or other document obtained or produced from or available in du Pont's office on the ground that a photostatic copy has been offered instead of the document contained in such files.

"2. The Government and du Pont each waives its right to object to the introduction into evidence of any agreement obtained or produced from or available in du Pont's files and listed in Paragraph 9 of the subpoena which the Government served on du Pont on October 30, 1944, on the grounds that it has not been shown that the signatures to such agreement were authentic or that it has not been shown that the individuals signing such agreement had authority so to do.

"3. The Government and du Pont each waives

its right to object to the introduction into evidence of any original letter or other original communication obtained or produced from or available in du Pont's files on the grounds that it has not been shown that such original letter or other original communication was signed by the person whose signature appears thereon, or that it has not been shown that such original letter or other original communication was received by the person to whom it is addressed.

"4. Provided that the author of any unsigned copy of a letter, memorandum or other document obtained or produced from or available in du Pont's files has been established to the satisfaction of the Court, the Government and du Pont each waives its right to object to the introduction into evidence of such copy on the grounds that it has not been shown that the original was signed by its author, or that it has not been shown that such original was mailed or sent to the person to whom it is addressed, or that it has not been shown that such original was received by such person. This paragraph shall not apply where it appears to the satisfaction of the Court from the face of the copy or from other documentary evidence that it has been established that the original was never mailed or received.

125 "5. The Government and du Pont each waives its right to object to the introduction into evidence of any report, publication or other document issued by any branch, department or agency of the United States Government or by any foreign government on the ground that such report, publication or other document has not been certified or authenticated.

"6. The Government and du Pont each waives its right to object to the introduction into evidence of any schedule or other compilation on the ground that the source material of such schedule or other compilation is not available in Court provided that the identity and location of such source material is clearly indicated on such schedule or other compilation, that such source material consists entirely of reports, publications and documents of the character referred to in paragraph 5 hereof, and that a copy of such schedule or other compilation has been furnished the other party a reasonable time in advance of its offer into evidence.

"7. The Government and du Pont each waives its right to object to the introduction into evidence of any copy of a United States patent or foreign patent obtained from

the files of the United States Patent Office on the ground that the original has not been offered.

126 "8. The Government and du Pont each waives its right to object to the introduction into evidence of quotations of any foreign patent laws taken from a plainly identified publication on the grounds that such publication has not been certified or authenticated.

"9. The Government and du Pont each may at any time during the pendency of this action (on reasonable notice to the other) make application to the Court to correct any error which may appear or subsequently be discovered in any copy of a document introduced into evidence as compared with the original of such document.

"10. This stipulation shall be deemed a full compliance by du Pont of the Request for Admission of Genuineness of Documents served on it by the Government on November 17, 1944.

"11. This stipulation is made for the purpose of saving the time of the Court and counsel on the trial of this case and it may be set aside or modified by agreement or by direction of the Court in the event that such action may by it be deemed necessary or desirable in the interest of justice.

"12. The matters agreed to herein are for purposes of this action only."

127 The COURT. That is a stipulation of the United States and du Pont only?

Mr. LOCKE. And du Pont only, but I would like to explain that we have an identical stipulation between the Government and the National Lead and Titan Company. I should like, if the Court please, to offer these in evidence.

(Marked Plaintiff's Exhibits 1 and 2.)

Mr. WEBSTER. If I may suggest, your Honor, I note the reporter was taking the stipulation down while Mr. Locke was reading it. It seems to me in the interest of complete accuracy it would be a good thing to have the reporter copy both stipulations in ex tenso into the record at this point, without following his notes.

The COURT. My idea is the reporter is in the habit of doing that anyway.

Stipulation

"It is hereby stipulated between plaintiff United States of America (hereinafter sometimes referred to as the Government and defendants National Lead Company (hereinafter sometimes referred to as National) and Titan

Company, Inc. (hereinafter sometimes referred to as Titan); by their respective attorneys:

128 "1. The Government and National and Titan each waives its right to object to the introduction into evidence of any contract, agreement, letter, memorandum or other document obtained or produced from or available in National's or Titan's files on the ground that a photostatic copy has been offered instead of the document contained in such files.

"2. The Government and National and Titan each waives its right to object to the introduction into evidence of any agreement obtained or produced from or available in National's or Titan's files and listed in Paragraph 9 of the subpoena served on National on October 30, 1944 and Paragraph 8 of the subpoena served on Titan on October 30, 1944, on the grounds that it has not been shown that the signatures to such agreement were authentic or that it has not been shown that the individuals signing such agreement had authority so to do.

129 "3. The Government and National and Titan each waives its right to object to the introduction into evidence of any original letter or other original communication obtained or produced from or available in National's or Titan's files on the grounds that it has not been shown that such original letter or other original communication was signed by the person whose signature appears thereon, or that it has not been shown that such original letter or other original communication was received by the person to whom it is addressed.

"4. Provided that the author of any unsigned copy of a letter, memorandum or other document obtained or produced from or available in National's or Titan's files has been established to the satisfaction of the Court, the Government and National and Titan each waives its right to object to the introduction into evidence of such copy on the grounds that it has not been shown that the original was signed by its author, or that it has not been shown that such original was mailed or sent to the person to whom it is addressed, or that it has not been shown that such original was received by such person. This paragraph shall not apply where it appears to the satisfaction of the Court from the face of the copy or from other documentary evidence that it has been established that the original was never mailed or received.

"5. The Government and National and Titan each waives its right to object to the introduction into evidence of any

report, publication or other document issued by any branch, department or agency of the United States Government or by any foreign government on the ground that such report, publication or other document has not been certified or authenticated.

130 "6. The Government and National and Titan each waives its right to object to the introduction into evidence of any schedule or other compilation on the ground that the source material of such schedule or other compilation is not available in Court provided that the identity and location of such source material is clearly indicated on such schedule or other compilation, that such source material consists entirely of reports, publications and documents of the character referred to in paragraph 5 hereof, and that a copy of such schedule or other compilation has been furnished the other party a reasonable time in advance of its offer into evidence.

"7. The Government and National and Titan each waives its right to object to the introduction into evidence of any copy of a United States patent or foreign patent obtained from the files of the United States Patent Office or from the files of the New York Public Library on the ground that the original has not been offered.

"8. The Government and National and Titan each waives its right to object to the introduction into evidence of quotations of any foreign patent laws taken from a plainly identified publication on the grounds that such publication has not been certified or authenticated.

131 "9. The Government and National and Titan each may at any time during the pendency of this action (on reasonable notice to the other party) make application to the Court to correct any error which may appear to subsequently be discovered in any copy of a document introduced into evidence as compared with the original of such document.

"10. This stipulation shall be deemed a full compliance by National and Titan with the Requests for Admission of Genuineness of Documents served on them by the Government on November 17, 1944.

"11. This stipulation is made for the purpose of saving the time of the Court and counsel on the trial of this case and it may be set aside or modified by agreement or by direction of the Court in the event that such action may be deemed necessary or desirable in the interest of justice.

"12. The matters agreed to herein are for purposes of this action only.

(Signed) WILLIAM C. DIXON,
*Attorneys for Plaintiff,
United States of America.*

(Signed) BETHUEL M. WEBSTER,

(Signed) CLIFTON P. WILLIAMSON,
*Attorneys for Defendants National,
Lead Company and Titan Company, Inc."*

132. The COURT. I think these stipulations have been very well conceived and I think should facilitate the trial.

Mr. LOCKE. I should like to say that we had the fullest cooperation from the other side in arriving at the various provisions of the stipulation.

The COURT. I take it this followed the conference we had at the pretrial?

Mr. LOCKE. Yes, if the Court please.

May we proceed, your Honor?

The COURT. Please do.

Mr. LOCKE. We had a subpoena issued, and I am informed by the marshal's office that service was effected. The subpoena was issued for Mr. Charles Kaegbehn and service was accepted by Mr. John Hendricks whom I understand is a National Lead Company secretary. If Mr. Kaegbehn is here I would like to have him take the witness stand.

Mr. WEBSTER. Mr. Kaegbehn is here and he is ready to take the stand.

133. CHARLES F. KAEGBEHN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. LOCKE:

Q. Mr. Kaegbehn, where do you live?—A. In Hoboken, New Jersey.

Q. And your street address there is?—A. 935 Bloomfield Street.

Q. What is your occupation?—A. I am a patent attorney.

Q. And your present employment is by whom?—A. National Lead Company.

Q. How long have you been employed by the National Lead Company?—A. Since September 1, 1930.

Q. Have you had any other employment in the interim?—A. No, that has been continuous.

Q. Will you please tell us the nature of your employment from period to period as the nature of your occupation changed from the time you first went with National Lead Company?—A. From September 1, 1930, until about March 1, 1934, I was research chemist employed on special investigations.

Q. Before we go on from there, can you detail the nature of your employment just a little so that we might have a fuller understanding of what that means?—A. I was employed originally to investigate the compatibility
134 of the National Lead Company pigments with oil soluble synthetic resins, and that engaged my time for about three years. Thereafter I undertook a special investigation to determine what were the causes for the decline in the sale of litharge to rubber manufacturers.

Q. May I interrupt. Will you give the definition of litharge?—A. Litharge is a lead oxide.

Q. And its principal use?—A. One of its principal uses is for storage batteries.

Q. Is it in any way related to, or does it have any connection with, the pigment business?—A. Ordinarily, no, sir.

Q. Please continue.—A. After reporting on the results of that investigation I was transferred to the Titanium Pigment Company to handle the details of the conduct of their patent matters.

Q. That was in 1934?—A. That was about March 1, 1934.

Q. That was then a separate corporate entity, was it, as distinguished from National Lead?—A. It was.

Q. And did you then become an employee of Titanium Pigments?—A. I did.

Q. Continue, please?—A. From about March 1, 1934, until about March 1, 1937, I was exclusively engaged with the patent matters of the Titanium Pigment Com-
135 pany, and subsequently, from October, 1936, until March, 1937, the Titanium Division of the National Lead Company.

Q. Now will you explain the nature of your work. You say you were concerned with that. Will you tell us what you did—not in too minute detail.—A. Well, the evaluation of inventions; preparation, filing and prosecution of patent applications. I should say that was the primary function of my work at that time.

Q. You were then not an officer of Titanium Pigments, were you?—A. No, I was not.

Q. Please continue.—A. From about March 1, 1937, I have been in charge of the patent department of National Lead Company as manager.

Q. And your duties as manager were what?—A. To have general supervision over the patent matters of the company.

Q. Are you now an officer of either National Lead or Titanium Pigments?—A. No, sir.

Q. Are you familiar with the corporation known as Titan, Inc.?—A. Yes, sir.

Q. Are you an officer of that corporation?—A. I am.

Q. What is the office you hold with that company?—A. I am secretary.

Q. And as secretary what are your duties? Any special duties?—A. Well, I have the custody of the minute-
136 book. I attend meetings of the board, report deliberations and enter them in the book and discharge what is ordinarily considered to be the duties of a secretary.

Q. Do you have any duties outside of those that come within your supervision as secretary of the company; that is, Titan Company, Inc.?—A. I supervise and handle their patent activities in the United States on this side.

The COURT. When you say "Titan, Inc." you mean Titan Company, Inc.?

Mr. LOCKE. That is right.

Q. How long have you been secretary of Titan Company, Inc.?—A. Within the year.

Q. Now, Mr. Kaegebehn, in the discharge of your duties you have become familiar, have you not, with the various contracts that Titan, Inc. has?

Mr. LOCKE. I will refer to it as "Titan, Inc.", if I may, if the Court please.

A. Yes.

Q. Mr. Kaegebehn, are you familiar with the product that is the principal job, so to speak, of Titanium Pigment; that is, TiO_2 ?—A. Yes.

Q. Was that their principal product while they were a corporate entity, and what is the principal product now of National Lead?—A. What corporate entity?

Q. Titanium Pigment?—A. Yes.

136a Q. Will you tell us what TiO_2 is?—A. It is the oxide of the element titanium, variously referred to as titanium dioxide and titanium oxide.

Q. TiO_2 is the end product, is it not, considering the process of manufacture of these pigments?—A. Yes.

137 Q. What is its principal use?—A. As a pigment in surface coating compositions.

Q. In addition to TiO_2 used in that particular way, there are combinations, are there not, that are described as extenders?—A. They are described as composite pigments.

Q. What is the distinction between a composite pigment and an extender pigment?—A. The composite pigment consists of two or more pigmentary materials intimately mixed, at least one of which has pigmentary properties of greater value and potency than the other. That which is the lesser is generally referred to as an extender.

Q. What is the source, the original source of TiO_2 ?—A. Some mineral which contains titanium.

Q. And is there a particular mineral that contains a high degree of the element and that is used commercially in the process of making TiO_2 ?—A. There are several.

Q. Will you name them, please, and describe them?—A. Rutile has perhaps the highest content of titanium of the naturally occurring minerals with which I am familiar. It is essentially naturally occurring titanium dioxide containing varying amounts of iron compounds as impurities. Ilmenite—

Q. Before you leave rutile, is that used commercially today in the production of TiO_2 ?—A. No, sir.

138 Q. Where are there deposits of that mineral?—A. There are some in the United States.

Q. Will you explain to the Court why that is not used?—A. It is rather refractory and does not lend itself very readily to chemical processes for placing the titanium in work.

Q. Name another one, another mineral?—A. Ilmenite.

Q. Will you describe that for us and tell us where it comes from?—A. Ilmenite is generally regarded as a chemical combination of iron, titanium and oxygen. It is sometimes considered by the chemists as ferrous titanate, by the physicists or metallurgists as a solid solution of iron oxide and titanium dioxide. Its content of titanium dioxide will vary, depending upon the quantity of impurities and other minerals with which the ilmenite is usually found in nature.

Q. Where is this ilmenite found?—A. It is found quite widely throughout the world.

Q. And in more than one form?—A. Yes.

Q. What are the forms, please?—A. The most common

forms as I know them are the so-called massive deposits in which the ilmenite is present in rock form. Such deposits as are found in Norway are massive deposits. It also is found in the form of sands. The Travancore deposit is a well-known sand deposit.

139 The COURT. Travancore is in India?

The WITNESS. Yes, sir. It is a principality—Travancore.

Q. The solid form of ilmenite that is found in Norway, is that form found in any other countries, any other place in the world?—A. Yes.

Q. Name some of them, please.—A. Well, I can name New York State, the Adirondacks.

Q. As you name these various places will you compare the extent of the deposit, if it has been determined, with the deposit in Norway?—A. I am not familiar with that, sir.

Q. Any other place except New York State?—A. Ilmenite has been found in the Carolinas, Virginia, Florida, and some of the Western States.

Q. It has also been found in South America, has it not?—A. Yes, I believe it has.

Q. Now, as distinguishing from the rock form, you said there was a sand form which was found in India. Is that sand form found in any other place?—A. The Florida deposits, in the United States, are sand.

Q. Any other places that you place of?—A. Those are the two with which I am familiar now.

Q. Isn't there a deposit of ilmenite some place in Portugal?—A. I don't know that.

140 Q. Well, now, that is two forms of minerals, so to speak, that contain ilmenite. What other forms are there?—A. Well, ilmenite is the form.

Q. It is the principal one?—A. No, I didn't—you asked me what other forms of minerals contain ilmenite.

Q. No, I did not mean that. I am sorry. TiO_2 .—A. There are others.

Q. Name them, please?—A. Sphene.

Q. Tell us what sphene is?—A. It is the combination of titanium with calcium, silica, oxygen, principally.

Q. Is that in solid form?—A. I can't tell you very much about that. I don't know much about that.

Q. Is that mineral used commercially in the production of TiO_2 ?—A. No, sir.

Q. Name another.—A. Perovskite.

Q. What form is that found in?—A. It generally, as I

understand it, resembles sphene in its constitution. It has calcium along with the titanium, some silica, aluminum.

Q. Is that mineral used in the production of TiO_2 for commercial purposes?—A. Not in the processes with which I am familiar, but I have heard that the Soviets have experimented with it and have had some success.

Q. Can you name another?—A. No, sir.

Q. There are four then. And of those four only
141 one is used, for all practical purposes, in the production of TiO_2 for commercial purposes, is that right?—A. As far as I know.

Q. That is ilmenite. I take it you have observed the process of producing TiO_2 from the minerals?—A. I have.

Q. You are familiar with the process of production in the National Lead Company, for instance?—A. In a general way, sir.

Q. Will you describe in a general way just what treatment is given to the original minerals, so to speak?

Mr. WEBSTER. Your Honor, I hesitate to interrupt for in many respects this witness is very competent, but I don't think he would want to give the impression that he is an expert either in research or manufacturing, and I therefore suggest to my friend that he confine his questions to subjects that the witness is concerned with professionally.

Mr. LOCKE. I am only concerned to this extent, that I want the Court to have some idea of the process of the manufacture—

The COURT. I can take his description now, not as an expert at all but as a witness who has observed certain things.

Mr. LOCKE. That is right.

142 Mr. WEBSTER. There will be witnesses here before the trial is closed who are qualified to give your Honor authoritative testimony concerning those matters.

Mr. LOCKE. I shan't go into any of the technical details.

The COURT. Very well, I will leave it to your judgment. Mr. Witness, you won't testify to anything that you don't know, of course; you should tell us what you have seen.

Mr. LOCKE. That is all.

A. The processes that I have seen depend upon the reaction between sulfuric acid and ilmenite. The purpose of that initial reaction is to render the titanium soluble and capable of further processing. That step is often referred to as the attack or digestion step. After the reaction there is obtained a more or less solid mass con-

taining principally the sulfates of titanium and iron. These are dissolved to form a solution of iron and titanium sulfates. That solution is then clarified and subjected to certain treatments which render it capable of being subjected to a boiling treatment which induces a chemical reaction. From the solution, as a result of which chemical reaction the titanium is precipitated, as an oxide of titanium chemically and physically associated with water. That product is variously referred to as
143 hydrated titanium dioxide or hydrous titanium oxide; and after washing treatments is subjected to a rather intense heat treatment called calcination, which dehydrates the hydrated oxide, eliminates certain impurities and produces the product which we call the calcined titanium dioxide. This product is subjected to some pulverizing and milling treatments in order to render it useful as a pigment material.

Q. You use the word calcination. What is the connotation of the word, calcination?—A. Roasting.

Mr. LOCKE. Now there is reference again and again in the documents and some of the letters that we propose to introduce, if the Court please, to various terms. I should like to have this witness—I should like to anticipate those just for the purpose of getting a definition at this time.

The COURT. If he is able to give them.

Q. The expression "chemically and physically combined state" is referred to again and again. What does that mean?—A. As a term, sir?

Q. As a term, yes; as a term applied to the titanium pigments. It describes the peculiar qualities of it, does it not?—A.

The chemical combination connotes a union, chemical union between two elements, two or more elements. For instance, the rusting of iron is a chemical combination of iron with the oxygen of air and
144 other elements. Physical combination to my mind is mixing, without the various components losing their chemical identity.

Q. Is it possible to have an end product which is physically and chemically combined?—A. I don't know of any such.

The COURT. Let me ask a question.

By the COURT:

Q. Suppose you had more of one of the elements than is necessary to enter into combination with the other element in its proper chemical combination, and you there-

fore have some of that element left over, it might still be in physical combination in the sense of the mixture, might it not?—A. Yes, sir.

Q. So theoretically, you could have oxygen and iron, as you say, and have more iron in the combination. You could, for instance, have two solids?—A. Yes, in that case, sir, I should regard the rust and the metallic iron as in physical combination and the rust itself a chemical combination with iron and oxygen.

Q. It would be easier to visualize liquids than gases.—A. It would be easier to visualize the solids.

Q. Supposing you had two elements forming a gas, two gases form a third gas, and you had more of one than the other sufficient to form that gas, there might be a
145 physical mixture there too?—A. Yes, sir.

The COURT. All right.

By Mr. LOCKE:

Q. The expression "titanium white" is used. What is the connotation of titanium white?—A. It is the expression used abroad, particularly in Europe, for titanium pigment.

Q. TiO_2 pigment?—A. I don't know whether it is TiO_2 or an extended pigment.

Q. What is lithopone?—A. It is a pigment consisting of zinc sulfide and barium sulfate.

Q. What commercial uses does lithopone have?—A. In the manufacture of surface coating compositions.

Q. Does it serve the same purpose as TiO_2 ?—A. Not TiO_2 , no, sir.

Q. I mean the pigment.—A. No, sir.

Q. What is the difference between the two?—A. It does not possess sufficient coloring power to compete with pigimentary titanium dioxide.

Q. Essentially they are both used as titanium pigments are used, that is, in the manufacture of paint, isn't that right?—A. That is correct.

Q. What is blanc fixe?—A. Artificially prepared barium sulfate.

Q. What commercial uses does it have?—A. It is
146 used as an extended pigment, for one.

Q. You said that lithopone and TiO_2 pigments were both used in the making or manufacture of paints. Have you any idea of their comparative values as a pigment?

The COURT. In what sense, commercially?

Mr. LOCKE. Commercially, yes.

The COURT. You mean a pound of one as compared with a pound of the other?

Mr. LOCKE. Yes.

A. What is your standard of reference there?

Mr. LOCKE. I will withdraw the question for a moment.

Mr. WEBSTER. Just a moment, I do not like to leave the record in a confused state. I thought the witness testified just a moment ago that there was no commercial comparison between lithopone and TiO_2 .

The COURT. The question is withdrawn, so we will take no note of it at all.

Q. Will you tell us what basic lead sulfate is?—A. It is commonly known as white lead.

Q. That is used in the manufacture of paint, is it not?

—A. That is correct.

Q. Tell us what basic lead carbonate is?—A. It is also used as a pigment.

147. Q. Is that true about zinc oxide?—A. Yes, sir.

Q. And you said it was true of lithopone?—

A. Yes.

Q. What is titanated lithopone?—A. It is lithopone containing a certain percentage of titanium dioxide.

Q. And is that used in the manufacture of paint?—

A. Yes.

Q. National Lead produces a product which they describe as Titanox-B, is that true?—A. Yes.

The COURT. How do you spell that?

Mr. LOCKE. T-i-t-a-n-o-x-"B", with the "B" in quotation marks. I am wrong; "Titanox" is in quotation marks.

Q. Is that the way it is used?—A. It is a trademark. We write it all capitals, sometimes in quotes and sometimes not; we separate the B by a hyphen.

Q. What is the combination of Titanox-B?—A. It has between 25 and 30 per cent titanium dioxide and the remainder barium sulfate.

Q. And that is used, is it, in the manufacture of paint?—

A. Yes.

Q. National Lead also produces a product which they describe as Titanox-C, do they not?—A. Yes, sir.

Q. Will you describe what Titanox-C as so produced is?—A. It is a mixture containing some of our 25 to 30 per cent—different grades contain perhaps a little more titanium dioxide than others, and the balance calcium sulfate.

148 Q. And is that product used in the manufacture of paint?—A. Yes, sir.

Q. What is zinc sulfide?—A. The chemical combination of the element zinc and the element sulfur.

Q. And that is used in the manufacture of paint, is it?—A. It has been.

Q. What is lead titanate?—A. It is the chemical compound resulting from the roasting together of lead oxide and titanium dioxide.

Q. That is used, is it not, in the manufacture of paint?—A. It has been.

Q. National Lead also produces a product which they describe under the trade name Titanox A, is that correct?—A. Yes, sir.

Q. Will you tell us what that is?—A. That is the pigmentary relatively pure titanium dioxide.

Q. And that too is used, is it, in the manufacture of paint?—A. Yes, sir.

Q. Kaergebehn, do you know Walter W. Plechner?—A. Yes, sir.

Q. Do you know where and by whom he is presently employed?—A. Unfortunately Dr. Plechner was killed in North Africa in March, 1943. He was a colonel in the United States Army at the time.

149 Q. Was he ever employed by National Lead Company or any of its associate companies?—A. Yes, sir.

Q. When he was last employed as far as you know what was the nature of his employment there?—A. He was assistant director of research of the Titanium Division of National Lead Company.

(Paper marked Plaintiff's Exhibit 3 for identification.)

Q. Is the difference between Titanox B and C and Titanox A, that the first two are what you described as extended pigments?—A. Composite pigments.

Q. Titanox A is not a composite pigment, is that right?—A. That is correct.

Q. That is a pure titanium dioxide?—A. Yes, sir.

Q. I have asked you questions with reference to various products which are used in the manufacture of paint. The value of those various products is determined by certain characteristics of them such as tinting strength, is that right?—A. Yes.

Q. And hiding power?—A. Yes, sir.

Q. Will you describe to the Court what the tinting

strength is.—A. It is the power to tint or impart color to a composition with which the pigment is associated.

Q. And what is meant by hiding power?—A. The capacity to impart opacity to a composition in which it is incorporated.

150 Q. Have you any knowledge with respect to the comparative tinting strength of the different material that you described; that is basic lead sulfate and so on?—A. Yes, sir.

Q. And do you have any knowledge with respect to their respective hiding powers?—A. Yes, sir. Hiding power and tinting strength are related. The higher the tinting strength generally the higher the hiding power.

Q. I show you a document which has been marked Plaintiff's Exhibit 3 for identification. Will you look at that, please, and particularly what appears to be a table on the page marked 6 in yellow pencil at the bottom of the page.—A. Yes, sir.

Q. Have you ever seen either this photostatic copy or the original of that document or any copy of it?—A. I have seen the original.

Q. And where was that original?—A. In the files of the National Lead Company.

Q. Do you know who the author of the document was?—A. Yes.

Q. Now, as far as you can determine that photostatic copy is a complete photostatic copy, is it not, of the pages in the succession that they appear in the exhibit?—A. As far as I can determine, yes.

151 Mr. WHITNEY. I only want to suggest to Mr. Locke that that is covered by the stipulation, and if you want to get the benefits of the stipulation you might start now.

The COURT. Except that he has not established before that it came from the files of the National Lead Company.

Mr. WHITNEY. Paragraph 1 provided that a photostat is admissible.

The COURT. Providing it came from the files.

Mr. WHITNEY. I mean very last or next to the last question.

Mr. WEBSTER. I do not know that it appears from anything that the witness says that it is complete. He would have to look at the original.

The WITNESS. That is correct. I could not say that that is the entire article.

Mr. LOCKE. He did say that these seven pages were identical with the seven pages of the original.

Mr. WEBSTER. I may say I have not had a copy of it and have not seen it before and I do not raise any question but that it may be complete, but one cannot tell.

The COURT. All right. That will be subject to the so-called correction clause in your stipulation. I assume you want to offer all of the pages.

152 Mr. LOCKE. If there are any additional, I want to have them.

The COURT. And you want them included, and that would be subject to the so-called errors and omission clause in your stipulation.

Mr. LOCKE. But I should like at this time to offer Plaintiff's Exhibit 3 for identification in evidence.

Mr. WEBSTER. This is not a document of which we have a copy. I think in most cases it will appear that the defendants have copies of papers that are offered in evidence, but for that reason I have got to concede, somewhat humbly, that I have never looked at it before. It covers a great many subjects and it appears to relate to bank notes and shoes and slippers and paint and wall sash and all sorts of things with a great deal of textual treatment which I confess I have not had a chance to review this morning.

The COURT. You have no objection to the competence? Your objection is to relevance, is that right?

Mr. WEBSTER. My question is relevance, and I am not too certain that it has been established that Dr. Plechner was an authority in all of the subjects that are purported to be covered in here. Perhaps if it is taken subject to the further objection on my part—

The COURT. We will receive it, subject to a
153 motion, as against National Lead. What about du Pont?

Mr. WHITNEY. If your Honor please, my objection is that I have not seen it, and it is not written by a du Pont official or any other employee of du Pont, and I want to add, your Honor, that had I been shown it I would bet 100 to 1 that I would have no objection, but I would ask the Government if we cannot accelerate the trial by having them show us in advance the documents which they are going to offer, but if they are unwilling to do so and want the benefit of what is sometimes called surprise, then I have to press what are sometimes called technical objections. I do not know what this says about my company. It is seven pages of print out of a magazine, and I object to it on the ground

of competence. It is an article by a deceased former official of National Lead that none of us have ever seen, and I have not been able to read it and I object.

The COURT. On what ground do you offer it against du Pont? It is not covered by the stipulation.

Mr. LOCKE. I should like to say to the Court that I propose at this time only to make inquiry of this witness with reference to matters that appear in this document that have to do with the nature of titanium and titanium pigments, its uses and its comparative value as compared to other pigments, and perhaps a little history of the development of patents and so on that are referred to in there which I think apply equally to du Pont.

Mr. WHITNEY. Your Honor, it is nearly 11.30. Perhaps we could clear it up in a few minutes if we could have the opportunity now.

The COURT. All right. We will take a recess and adjourn the disposition of that objection until after the recess.

Mr. WHITNEY. I would like to request that the Government, if it wants to get on with the trial would show us all papers the night before, and we probably could clear them almost all up immediately.

The COURT. I won't make that direction. That is a matter that I leave entirely to the judgment of counsel.

Mr. LOCKE. I should like to avoid the implications of Mr. Whitney's remarks which might be left with the Court. This is the only document, the only photostatic copy, we have in our possession of which we do not have at least another copy. I have already discussed with counsel on the other side, and have told them that I would, as far as I could, notify them in advance of the documents that we propose to offer the succeeding day.

Mr. WHITNEY. That is splendid. Then will the Government give us a copy of this?

155 Mr. LOCKE. I do not know what facilities we have.

The COURT. You will have to adjust that during the recess.

(Short recess.)

Mr. WHITNEY. Your Honor, we have had an opportunity to examine the document and I am quite contented to have Mr. Locke ask questions along the lines of it, leading questions or anything else he likes, but I have to object to it on the ground of competence as an exhibit.

Mr. WEBSTER. If the Court please, my friend, Mr. Whitney, was so charmed with it that he took it into his

chambers and I have not examined it, but I understand Mr. Locke only proposes to use it to bring out from the witness, if he knows, certain facts concerning the uses of titanium, and on page 6 he calls to the attention of the witness and asks him certain questions concerning the tinting strength and hiding power, and to that extent I have no objection to it.

The COURT. It will be received against National Lead and Titan Company, and excluded as against du Pont Company.

(Plaintiff's Exhibit 3 received in evidence as limited.)

Mr. WEBSTER. This is something that would relate 156 to other matters that would come up, and while I do not state it in connection with this question of the offer, I assume that under the rules it is no longer necessary to ask your Honor to give us an exception whenever you make a ruling that we regard as adverse.

The COURT. Whether that be the rule or not I will give you an exception anyhow to whatever ruling I make, and thus save time.

By Mr. LOCKE:

Q. Will you glance again at the exhibit, and particularly the two tables that appear in the lower lefthand corner of the page marked 6?—A. Yes. I would like to make a correction in what I believe I testified to before. You asked me what was the basic lead sulfate, and I believe I said that was white lead. I should have said it is a pigmentary material. Basic lead carbonate is white lead.

Q. And what is basic lead sulfate?—A. It is a pigment material, sir.

Q. But not white lead?—A. That is right. The basic carbonate is commonly known as white lead.

The COURT. Very well.

Q. On page 6 of two tables you referred to, the table marked 2 and the table marked 3, the table marked 2 deals 157 with tinting strength and hiding power of basic lead sulfate and the other materials that I asked you about. Do you have any knowledge—I don't remember whether you testified that you did or did not—with regard to the tinting strength and hiding power of these various materials?—A. Yes, sir.

Q. Will you look at table 2 and tell me whether or not you think that is a correct representation of their respective qualities; that is the qualities of those various materials?—

A. I believe that to be correct with this notation, that the

titanium dioxide is the anatase form.

Q. Anatase as distinguished from what other form?—

A. Rutile.

Q. Will you describe the two forms.—A. (Continuing) And I do believe that this figure for the titanium dioxide, even the anatase, is a little low.

Q. Will you keep that in mind. I am going to read that table in a moment so that you can make the correction when you arrived at that particular line?—A. Yes, sir.

Q. Will you describe the difference between anatase and rutile.—A. Titanium dioxide is what the scientists refer to as a polymorphic substance, meaning that it exists in more than one crystalline variety. Anatase is one crystalline variety of titanium dioxide. Rutile is another.

158 Q. Will you give us their distinguishing forms?

—A. I cannot give you their crystallographic constants. They differ in external form of the crystal and internal lattice or structure. They possess different properties, for instance pigment properties.

Q. Anything further?—A. Rutile has a higher index of refraction and higher tinting strength and higher hiding power, potentially if you could develop the optimum properties of each.

Q. Have you finished?—A. Yes, sir.

Q. Now the anatase form, that is being produced commercially at the present time? A. Yes, sir.

Q. Is that true with respect to the rutile form?—A. Some is being produced commercially.

Q. What is the comparison between the amounts produced of each of them?—A. Anatase is being produced in substantially greater amounts than rutile at the present time.

Q. Earlier in the examination you said that the end product was derived from a mineral that you described as rutile.—A. Not the end product.

Q. You said that one of the minerals from which TiO_2 was derived was ilmenite and another was rutile.—A. I do not recall saying that titanium dioxide was derived from rutile.

159 Q. The mineral rutile you already described?—

A. Yes, sir.

Q. What is produced from that?—A. It has a use, the only use for it that I know of, in coatings for electrodes in arc welding.

Q. There is a difference between the rutile mineral and the rutile pigment, is that not so?—A. Very much.

Q. The rutile pigment is an end product?—A. Yes, sir.

Q. And the rutile mineral, that is a mineral that is found on the surface of the earth before it has been processed, is that right?—A. It is found on the surface of the earth.

Q. And before it has been processed for any commercial use?—A. I do not know of any processes that depend upon rutile.

Q. Now will you refer to the exhibit and read table 2—

The COURT. That would be an unusual procedure, but we now having accepted table 2 with a correction I will receive that table in evidence against du Pont if you offer it.

Mr. LOCKE. That is what I want to accomplish.

The COURT. All right. Table 2 of Exhibit 3 is now received in evidence against du Pont.

160 (Table 2 of Plaintiff's Exhibit 3 considered marked.)

Q. Will you look at table 3 and read the heading to that table.—A. The heading reads "Hiding Power Cost to Cover 1000 Square Feet Over a Black Surface."

Q. Now you have studied that table?—A. I see what it says.

Q. And if the question were asked you would you say that the representations made in that chart are true?

Mr. WEBSTER. I object to the form of the question.

The COURT. The objection is sustained. Ask him the question. If you put it hypothetically as to what he would answer if you asked him it is objectionable.

Q. If you look at table 3, are the representations made in that table true to the best of your knowledge?—A. To the best of my knowledge.

Mr. LOCKE. I offer that as against du Pont.

Mr. WHITNEY. I object to that as against du Pont. This article from National Lead in a magazine four years ago could not possibly have any evidentiary bearing on the cost of production by the du Pont Company.

The COURT. That is quite true, but the witness's present testimony can have.

161 Mr. WHITNEY. But at most only against National Lead. Maybe our costs are utterly different. They may be higher or they may be lower.

Mr. LOCKE. I should like to explain this: I am not offering it to establish the cost of any product produced either by du Pont or National Lead. I am offering it merely to establish the comparative costs.

The COURT. Let me find out one thing: Does the table

indicate costs in the sense of cost of manufacture or market price?

The WITNESS. It is a table which purports to show how much a user would pay in terms of hiding power to cover a black surface.

The COURT. And that would depend, of course, and would have to be translated out of the market price of the product?

The WITNESS. Yes.

The COURT. And not on the cost of manufacture?

The WITNESS. Yes.

The COURT. I will receive it against du Pont.

Mr. WEBSTER. May I state my objection; that the witness is not qualified to deal with questions of cost. He is not here as an economist. He is not concerned in his professional capacity with matters of cost or relative cost.

The COURT. That may be true, but he is an officer of the company that sells this product, and if he says he knows it, I will take his word.

Mr. WEBSTER. He is not an officer of the company that sells the product. He is an employee of the patent department.

The COURT. He is also secretary of the Titan Company.

Mr. WHITNEY. Let him describe what he did. He says he kept the minutebook.

Mr. WEBSTER. The Titan Company, Inc., of which he said he had been secretary since sometime last summer is a company concerned with very different matters from the manufacture and sale of titanium pigments. The company that manufactures and sells titanium pigments is the National Lead Company, the Titanium Division of the National Lead Company.

The COURT. Will you establish his opportunity and capacity to testify with respect to the field in which you are now inquiring?

Mr. LOCKE. I will withdraw the question to save a lot of argument, if the Court please. It is not that important.

The COURT. All right.

(Paper marked Plaintiff's Exhibit 5 for identification.)

163 Mr. WHITNEY. You admitted table 3 against du Pont?

The COURT. Table 2.

Mr. WHITNEY. And evidently the clerk has marked that 4, but I suppose that will be all right.

The COURT. If you want a separate number for the table all right.

Mr. WHITNEY. We might as well have it, because that is a small part of the article.

The COURT. All right. We will call table 2 Exhibit 4.

(Table 2 of Plaintiff's Exhibit 3 marked Plaintiff's Exhibit 4.)

164 Q. Mr. Kaegebehn, you stated that titanium dioxide pigment as well as these other materials that were found in table 2, are used in the manufacture of paint. Is that correct?—A. May I see that again?

Q. (Hands to witness)—A. Yes, sir.

Q. Titanium dioxide pigment has other uses, has it not?—A. Has what?

Q. Than the limited use in the manufacture of paint?—A. Yes, sir.

Q. Will you name some of the other products in which it is used?—A. Well, in each of the uses it is functioning as a pigmentary material generally. As such it is incorporated in a number of other compositions: paper, to impart whiteness and opacity; and rubber; in white shoe dressings; inks.

Q. It is sometimes used in leather?—A. As far as I know, to a very limited extent.

Q. Is it used in cosmetics, in the manufacture of cosmetics?—A. I have heard of it being used in that connection.

Q. Is it used in the manufacture of rayons?—A. Yes.

Q. Can you think of any other uses that it has?—A. Well, I mentioned that one of incorporation in cuttings of welding rods where it does not exactly function as a pigment material, but as a sort of arc building material.

165 as they call it.

Q. I will ask you to look at two photostatic copies bound together, marked Plaintiff's Exhibit 5 for identification. Have you ever seen that photostatic copy or the original of which that is a copy, before?—A. I have.

Q. There is a legend at the bottom of the page to the effect "Prepared by C. F. Kaegebehn, Manager Patent Department, National Lead Co., June 1st, 1942." Did you prepare these two documents?—A. Yes, sir.

Q. What was the source of the information that is reflected in these two documents?—A. Various documents in my files, in the files of the company; and my own knowledge acquired in the conduct of my work.

Q. As to National Lead Company, one of the defendants here, do you know where it is incorporated?—A. In the State of New Jersey.

Q. Where is its principal place of business?—

The COURT. Aren't those elements admitted in the answer?

Mr. WEBSTER. They are, your Honor.

The COURT. If you want to call it to my attention I will take it, but you do not have to prove it.

Mr. LOCKE. The admissions in the answer are in some instances rather specious.

Mr. WEBSTER. This could hardly be said to be
166 specious, which is a characterization I don't care for. This is admitted, the facts that my friend is now referring to, by a failure on our part to make a denial, which is rather a conventional and not a specious form of pleading.

The COURT. If you want to call it to my attention I will take it, but you don't have to prove things that are admitted in the answer.

Mr. LOCKE. Very well, your Honor.

The COURT. I haven't a set of marked pleadings, consequently I can't do it for you.

Mr. LOCKE. I would like to call the Court's attention then to the fact that, as far as paragraph 2, dealing with the National Lead Company—

The COURT. Just give me the fact which you understand is admitted.

Mr. LOCKE. I understand that National Lead Company admits all of the allegations in paragraph 2 from the fact that they do not make any mention of it in their answer.

The COURT. Yes. But disregard that statement and just tell me the fact which is admitted. You say it is admitted that the defendant National Lead is incorporated in such-and-such a State or that it has its principal place in
167 such-and-such a place; anything of that kind, and just state the facts. I don't want to have to go to the pleading to see what it is you are referring to.

Mr. LOCKE. It is admitted by both parties that National Lead Company is a corporation organized under the laws of the State of New Jersey, with its principal place of business at 111 Broadway; that it is one of the largest manufacturers of pigments in the United States; it is also the largest manufacturer of compounds in the world.

Mr. WEBSTER. Titanium compounds.

Mr. LOCKE. Titanium compounds. Manufacturing at least 50 per cent of such compounds produced in the United States. That much has been admitted by both defendants.

National Lead Company and Titan admits that the assets of National Lead Company are in excess of a hundred million dollars.

With respect to Titan Company, Inc., it is admitted by both parties that it is a corporation organized—

The COURT. By both parties, you mean—

Mr. LOCKE. All three parties, I should say, if the Court please.

Organized under the laws of the State of Delaware its principal place of business at 111 Broadway.

168 Defendant National Lead admits, and so Titan Company admits, that 100 per cent of the stock of Titan Company is owned by defendant National.

Mr. WEBSTER. That is the Titan Company, Inc.

The COURT. Yes. You had better distinguish them.

Mr. WEBSTER. I think we have to keep them distinguished.

The COURT. Your abbreviation is Tinc.

Mr. LOCKE. Right.

Mr. WEBSTER. Titan, Inc.

Mr. LOCKE. It is admitted by all three parties that Titan, Inc. now owns and for some time during the period covered by the conspiracy alleged has owned large numbers of patents and licenses.

Mr. WEBSTER. Well, I am not going to quarrel with my friend about the exact form of what he says—well, go ahead. I will try not to find fault with little things.

The COURT. All right.

Mr. LOCKE. With the right to grant sub-licenses, all relating to the manufacture and use of titanium compounds.

Mr. WHITNEY. We don't know anything about the sub-licenses. Mr. Locke is correct in the main. There
169 is no admission in our answer about sub-licenses. We are without knowledge or information on the subject.

Mr. LOCKE. I did not mean to read sub-licenses but to read "licenses" only.

Mr. WHITNEY. We all thought you said "sub-licenses." we now apologize to you.

Mr. LOCKE. Defendant National admits that Titan, Inc. had the right to grant sub-licenses.

Defendant National admits that Titan, Inc., also owns the following percentages of the voting stock of the following named foreign companies:

As to BTP, 44 per cent.

As to TG, 50 per cent.

As to SIC, 57 per cent—

Mr. WEBSTER. SIT.

The COURT. SIT? I have no such abbreviation in my list.

Mr. WEBSTER. The French Company that is. It is all in the answer. That is Societe Industrielle, your Honor.

The COURT. Oh, well, it is listed here as SIC. Do you want me to change that to SIT?

Mr. LOCKE. If you will, please. (Continuing) 57.638 per cent. As to Titan, A/S—was that a hundred per cent?

170 Mr. WEBSTER. I don't at the moment see it in the answer, but the fact is that National Lead owns 87 per cent of Titan A/S, and having read the report of yesterday, the reporter has very naturally made a mistake about the designation for that. When we refer to Titan A/S we refer to Titan A diagonal S. And that is the Norwegian company, of which we own 87 per cent. That is admitted in paragraph 4.

Mr. LOCKE. As to TK, 18½ per cent.

Defendant National admits that since its formation in 1929 Titan, Inc. and all of its policies and activities have been controlled by defendant National and a majority of Titan, Inc.'s officers and directors are and at all times have been officers—

Mr. WEBSTER. Excuse me. From what paragraph are you reading?

Mr. LOCKE. Paragraph 3 of the complaint. That is your paragraph 1, I think.

As to E. I. du Pont, that is DP, all defendants admit that Du Pont is a corporation organized and existing under the laws of the State of Delaware.

Mr. WHITNEY. Are you going through this whole complaint now and reading into the record all we admitted in our answer? Because we have all filed printed documents and you could mark the pleadings. I am only
171 thinking of the interest of time.

The COURT. There are some facts which, by having counsel call it to the Court's attention, might facilitate matters; otherwise the usual practice is to submit a set of marked pleadings.

Mr. WHITNEY. It will take all day to do this.

The COURT. Is it much more?

Mr. LOCKE. It has to do with all the defendants, your Honor.

Mr. WHITNEY. Paragraph 3: And there are about 77 paragraphs.

Mr. LOCKE. My only purpose was to give the Court a picture of the background.

The COURT. Well, I would suggest that you limit yourself to some outstanding fact which you believe I should keep in mind as the case proceeds, and for the rest you rely upon the marked pleadings.

Mr. LOCKE. Well, we will call those to your Honor's attention—

The COURT. You call it to my attention in a brief or in any other manner. But in view of what Mr. Whitney says denial of knowledge and information, where a fact is admitted by National Lead and there is no other proof on the subject, I will consider that as evidence which if relevant would be against du Pont as well. Do you follow me?

Mr. WHITNEY. I don't understand.

The COURT. Suppose there was one item wherein you said that your answer denies knowledge or information. That may be a fact which was admitted by National. The admission by National I will regard as evidence in the case, and if there be nothing else in the case why I will take that for all parties if relevant to all parties.

Mr. WHITNEY. Would your Honor permit me to request your Honor to reserve ruling on evidence until I can be heard on it? And in that particular case I will submit, and I think your Honor will want to see, the decisions of the Supreme Court of the United States which are unanimous to the effect that the only admissions by one party that are admissible against the other are admissions in furtherance of the object of the conspiracy if the conspiracy has been established.

The COURT. Mr. Whitney, I am not addressing myself to that rule of evidence at all. I am aware of the rule that you are now adverting to. But I am calling your attention to a thought that is running through my mind so that if I am in error you can correct me.

Supposing it appears that there is an allegation in the complaint that National Lead is incorporated in the State of Delaware. National Lead admits that. You deny knowledge or information. At the close of the trial nothing further appears in the record on that question. I say to you that on the strength of that admission by National Lead, I would feel justified in making a find-

ing that National Lead was incorporated in the State of Delaware, and such a finding if relevant as against du Pont, I would make as against du Pont as well, although there was no affirmative proof of that fact other than the fact of admission by the defendant National Lead. That has nothing to do with the law of conspiracy. Am I in error about that?

Mr. WHITNEY. Your Honor, with great respect to you, you are. A finding has to be made upon evidence. Your Honor cannot make a finding except upon valid evidence. And the rule to which I have referred is a rule of evidence which your Honor—

The COURT. Let me put it to you this way. Suppose Mr. Locke calls the president of National Lead to the stand and he asks him, "Where are you incorporated?" and he says "Delaware." That is an admission and it is also evidence. Now I would certainly be justified if nothing further appeared in the record, that National Lead was incorporated in Delaware; and make that finding as against du Pont if relevant against du Pont.

Mr. WHITNEY. To that I agree, because I would 174 then have my opportunity either to object to the question when asked or to call to your Honor's attention that that line of testimony was not binding on du Pont. Alternatively, I would have the opportunity to cross-examine and to bring out that it was a false statement or to submit my evidence to that effect. But I have no opportunity to cross-examine the pleading submitted by National Lead. And, with great respect to your Honor, the only findings that you can make against one defendant where there is no evidence on the subject are the findings based upon the answer and admission of that defendant. You can't make a finding based upon an admission by National Lead where no further evidence has been submitted against du Pont. Otherwise these rules would be meaningless.

Mr. WEBSTER. I venture to suggest that your Honor has set up a straw man and that Mr. Whitney has knocked it down. I think that all of the critical issues of fact as well as the law in the case will appear in the form of testimony or evidence in the usual form, and the question of the admission by one defendant in his answer of a statement with reference to the other two will not become so critical.

The COURT. That may well be. I was wondering whether, in view of what Mr. Whitney says, and in view

of the fact that there are some eighty or ninety paragraphs in this complaint, if Mr. Locke was then going to proceed to prove a lot of purely mechanical propositions such as the place of incorporation, whether we couldn't avoid that necessity. Apparently I may be in error. It may be, it is true, that Mr. Whitney would be entitled to cross-examine with respect to that, in which case I can't make such a finding as he speaks of.

Very well, we will withdraw any such intimation and rule on the situations as they arise.

Mr. LOCKE. Then, your Honor, I am going to have to take paragraph by paragraph to get what proof I think is necessary where there isn't an admission by both parties.

The COURT. Well, you will have to consider that.

Mr. WHITNEY. Your Honor, that is a suggestion that it would be advisable in the course of the conduct of the trial for Mr. Locke at this stage to again make an opening to your Honor, supplementing Mr. Dixon's, in this case opening the pleadings by describing to your Honor in detail what the issues are as shown by reading off to your Honor what each party admits or denies. That is what he is suggesting. My rising was only as a matter of convenience, to ask whether it was necessary that that be done. It is not evidence; we are not taking
176 evidence now, we are having a little reopening.

Mr. LOCKE. No, We are taking evidence, if the Court please, as to what we think is in support of material allegations that have neither been admitted nor denied.

Mr. WHITNEY. Well, let us go on to take evidence.

The COURT. Very well.

Mr. WHITNEY. You can't do it by reading pleadings.

The COURT. If there be some allegation in the complaint which you deem admitted, which you think is of sufficient significance so that I ought to have it in mind as the case proceeds, call it to my attention. Otherwise I will examine the pleadings or you can give me a set of marked pleadings, or you can refer to the admissions in your argument or your brief, in any way at all.

Mr. WEBSTER. I think your Honor's suggestion about marked pleadings is the practical one.

The COURT. That is the usual course.

Mr. WEBSTER. If copies were served on us we could make suggestions for corrections and I think it would be quite clear and we would not take two or three days reading the complaint and answer.

The COURT. All right.

Mr. LOCKE. May I suggest, then, if your Honor please, for the purpose of expediting this, that I reserve
177 the right to come back to any problems of proof in support of any of these allegations that have to do with the corporate organization and the intercompany interests?

The COURT. Certainly.

Mr. LOCKE. With that reservation we surrender the witness.

The COURT. All right, Mr. Webster. Are you going to proceed in that order usually, Mr. Webster and Mr. Whitney?

Mr. WHITNEY. Yes, sir.

The COURT. Very well.

Mr. WEBSTER. We have no questions to ask Mr. Kaegebehn at this time.

Mr. WHITNEY. No questions.

The COURT. You are excused.

Offers in evidence

Mr. LOCKE. Now, if the Court please, the Court will remember that in the stipulation I read this morning some reference was made to the service of a subpoena on the various parties, and pursuant to our understanding with counsel for the other side we have advised the parties of the documents that we want them to produce at this time under that subpoena.

I should like to ask National Lead to produce
178 the document called for in paragraph 3 of the subpoena served on National Lead.

Mr. REA. I hand you, Mr. Locke, material prepared from the records of National Lead Company in response to item No. 3 of the National Lead subpoena.

(Plaintiff's Exhibit 6 marked for identification.)

Mr. LOCKE. This document, if the Court please, marked Plaintiff's Exhibit 6 for identification, consists of three pages, and it purports to be a schedule showing the extent of stock holdings and other financial interest of National Lead Company in any of the companies named in paragraph 1 of the subpoena. I won't bother to read them now but they constitute all of the co-conspirators—not all of them, but all of these mentioned in paragraph 1.

Mr. WHITNEY. He hasn't a copy for me and it is four pages of statistics. I just can't read it. It will take me

until two o'clock to read it, and, if your Honor please, it would take me a week to check it. I don't know whether we can check it.

The COURT. It is not necessary to check it in order to object to its admissibility.

Mr. WHITNEY. Thank you, your Honor.

Mr. LOCKE. I now offer this document in evidence and ask that it be admitted, if your Honor please.

179 The COURT. Is there objection?

Mr. WHITNEY. Yes, your Honor, I object to it as to du Pont.

The COURT. On what ground?

Mr. WHITNEY. Incompetent, irrelevant and immaterial. Incompetent because it is a paper prepared by National Lead, giving their own stockholdings, and we have no knowledge about that. Relevance and materiality, because the stockholdings of National Lead and its various subsidiaries could only be of interest if we and they were in a so-called conspiracy, and that is not being connected. And third and last, because the declarations by National Lead, of which I take it this would be one, are only binding against us if they are made in furtherance of the conspiracy, and giving evidence to the Government is not in furtherance of the conspiracy.

The COURT. Any objection by Mr. Webster?

Mr. WEBSTER. I have an objection, your Honor. Of course this was prepared by us, and carefully prepared, and so I make no objection on any ground except materiality. I do not think it is going to prove to be material here whether we owned shares in Associated Lead Manufacturers, Ltd., Imperial Smelting Corporation, Ltd., Goodlass Wall and Lead Industries, and various other companies named in here, including the American
180 Zirconium Company, in which at one time we did own a few shares of stock. I assume that the case relates to a combination and conspiracy, an alleged combination and conspiracy to restrain or monopolize trade, and I do not believe these facts will ever become material to prove any such conspiracy. That is the ground of my objection.

The COURT. Objection overruled as to National Lead. Sustained as to du Pont.

(Plaintiff's Exhibit 6 for identification received in evidence as limited.)

The COURT. And when I say National Lead, let the record indicate that I always include Titan.

Mr. LOCKE. Now, if your Honor please, National Lead has asked us to indicate on the face of the exhibit the particular paragraph number of the subpoena under which this is produced. I haven't had these documents until now and we will mark them after they have been introduced in evidence, if the Court has no objection.

Mr. WEBSTER. I am sorry, we can't hear Mr. Locke.

The COURT. I am not interested in that. I am not in any way interested under what paragraph—

Mr. LOCKE. I just did not want to change the face of the exhibit after it had been introduced. (To counsel:) You asked that we mark each exhibit with the paragraph, the subpoena paragraph number, did you not?

181 The COURT. I am not interested in that.

Mr. LOCKE. I now ask National Lead to produce a schedule giving the names and positions of offices held by the persons so named, of the officers, directors and members of any executive or other official department of the company or associations named in paragraph one of the subpoena.

Mr. REA. What number is this?

Mr. LOCKE. Number 6.

Mr. REA. I now hand you, Mr. Locke, material prepared from the records of National Lead Company and from Titan Company, Inc., in response to items 6 of both subpoenas, so that this material will be in response to item 6 of the National Lead subpoena and in response to item number 6 of the Titan Company, Inc. subpoena.

(Plaintiff's Exhibits 7 to 20 inclusive marked for identification.)

Mr. LOCKE. I offer these documents in evidence, if the Court please, numbered for identification from 7 to 20 inclusive.

The COURT. Any objection, Mr. Webster?

Mr. WEBSTER. May we form those in some way so that—

The COURT. You will have an opportunity.

182 Mr. WEBSTER. He is now offering everything that has been produced pursuant to item 6 of the subpoena?

Mr. LOCKE. That is right.

Mr. WEBSTER. Well, I hate to seem captious.

The COURT. State your objection.

Mr. WEBSTER. This contains a good deal of information, the materiality of which is not certainly apparent—

things about the United Lead Company which was not mentioned in the opening and does not seem to have any connection with the case; things about Societa Industrielle, which is a French Company, and not present here, and so forth.

The COURT. Does it give the officers of these various companies?

Mr. WEBSTER. It gives the officers and directors. I suppose in the interest of avoiding loss of time I won't make any very firm objection.

The COURT. Mr. Whitney.

Mr. WHITNEY. If your Honor please, during these few moments I had an opportunity to look through Exhibit 6, and I have now looked through 7 to 20, and may I just say to your Honor that on authenticity, the fact that they are produced from National Lead files, will satisfy us. On relevance and materiality, after going through them, it has occurred to me that perhaps they are relevant and material because when your Honor comes to sum up
183 in your own mind as to whether there is a conspiracy between us and National Lead, it doubtless would be material and relevant to that question for you to know who the respective officers and directors were and what the respective stock holdings were, to see what, if any, intermingling there is. I believe there is none; trivial. And therefore it does occur that they are relevant and material. So, with your Honor's permission I will withdraw the objection to 6 and I will consent to 7 through 20.

The COURT. 6 is admitted as against all defendants, and 7 to 20 are admitted as against all defendants. I had excluded it before on the ground of competence. I hadn't given any consideration to the question of relevance and materiality, it not having been necessary for me to reach that question.

Mr. WHITNEY. As I thought it over, I did not want to be in the position of arguing to your Honor what I do not believe. And I think I was wrong, on seeing the papers.

The COURT. Very well.

(Plaintiff's Exhibit 6 now received as to all defendants; Plaintiff's Exhibits 7 to 20 for identification received in evidence.)

Mr. LOCKE. Now ask National Lead Company to
184 produce lists indicating the various offices of employment held in any of the companies or associa-

tions named in paragraph one of the subpoena by any director or official of National Lead Company, from January 1st to the present date. That is under paragraph 7 of the subpoena.

Mr. REA. I now hand you, Mr. Locke, material compiled from the files of National Lead Company and records from the National Lead Company, in response to item number 7 of the National Lead subpoena.

(Marked Plaintiff's Exhibit 21 for identification.)

Mr. LOCKE. Now I shall offer the document which has been marked Plaintiff's Exhibit 21 for identification in evidence.

The COURT. No objection. It will be received.

(Plaintiff's Exhibit 21 for identification received in evidence.)

Mr. LOCKE. I now ask National Lead to produce a schedule showing the official title and the office held, connection or employment, by the National Lead or by any of the companies named in paragraph one, of certain persons whose names are listed in the subpoena. That is requested under paragraph 8 of the subpoena.

Mr. REA. I hand you Mr. Locke, material prepared in response to item No. 8 of the National Lead subpoena from the records of the National Lead Company.

(Marked Plaintiff's Exhibit 22 for identification.)

185 Mr. LOCKE. Now, if the Court please, it appears from the face of this document that this is not in compliance with the request that we made in paragraph 8. The subpoena reads: "A schedule prepared from the original records showing the official title, office held, if any, connection or employment." The schedule that we have been given carries the names of various persons who are identified only by the word "Retired." It was our construction of the language of that particular paragraph that it would give us information with respect to the employment at any time from 1920 up to the present time of the various individuals mentioned, and I should like to have the document corrected accordingly.

Mr. REA. Your Honor, if you look at the subpoena—I do not know whether you have a copy—

The COURT. I have heard it. It is capable of both constructions. "Office held" may mean presently or historically.

Mr. REA. It said nothing whatever about 1920 to date, and each paragraph prior to that specifically says "1920". We interpreted that paragraph to mean currently.

The COURT. All right. What you want to do is have counsel prepare a new schedule along the lines indicated.

186 Mr. LOCKE. Yes, your Honor.

The COURT. The request has been made. How much time would you need to do that?

Mr. REA. It is a pretty long job.

The COURT. Did he give you a list of names?

Mr. LOCKE. Yes. He gave a list of names.

The COURT. What period do you want covered?

Mr. LOCKE. 1920 to the present time.

Mr. REA. That is a huge job.

Mr. WEBSTER. A terrible job.

The COURT. Well, take a week?

Mr. WEBSTER. We will do the best we can. If you do not want it we will take it back.

Mr. LOCKE. It has been identified.

Mr. WEBSTER. He is returning it to us. He does not accept it in compliance with the subpoena.

The COURT. All right.

Mr. LOCKE. I now request the National Lead Company to produce pursuant to the demand in the subpoena either the original record books or schedules made therefrom containing a complete trade price list of TiO_2 and composite pigments or compounds, including trade price lists for TiO_2 and composite pigments or compounds sold in Canada by National Lead Company or any of its controlled subsidiaries from January 1, 1920 to and
187 including the date of the service of this subpoena, together with records showing the manner and method of arriving at said price lists pursuant to paragraph 19 of the subpoena.

Mr. WEBSTER. Now, where we could we have compiled the schedules in the interest of convenience and to speed the trial of the case. In some cases it has not been possible to do that and we have produced original documents. Now in the case of that portion of Mr. Locke's request it calls for price lists for Canada. We have produced a letter from the sales manager of the Canadian Pigment Company to Mr. Coudry, the sales manager of the Titanium Pigment Corporation, attached to which are a number of schedules. These are the only ones we have.

Now with reference to the price lists for the United States there are a great number of them. They are the original documents. They are the only documents in the possession of the National Lead Company, and we produce

the originals and we have no copies. I think with this remark it will probably lead your Honor, or Mr. Locke to suggest to your Honor, that something be done to enable them to take possession of these at least temporarily for the purpose of examination, and anticipating that request

188 I suggest that it be impounded here in the court-room in the exhibit file, and that Mr. Locke indicate to us what portions of it he would like to make copies of, and that he and Mr. Henrick, who is assistant secretary of the Lead Company and also a member of the bar of this Court, together examine these impounded documents, all of which is tentatively helpful.

Mr. WHITNEY. Except to us.

Mr. LOCKE. We accept the suggestion, if the Court please, and we defer consideration of that until we get back to considering the other documents.

The COURT. Is it produced meanwhile?

Mr. WEBSTER. It is here and it is produced in court. It is here in our possession.

Mr. LOCKE. May I have it identified?

The COURT. You may have it marked for identification, yes.

(Marked Plaintiff's Exhibits 23 and 24 for identification.)

Mr. WHITNEY. I would like to ask Mr. Webster again on the record whether we are going to be given access to this or not?

The COURT. It has not been offered in evidence as yet. Are you going to offer it?

Mr. LOCKE. Yes.

The COURT. As soon as it is offered in evidence Mr. Whitney will have an opportunity to look at it.

189 Mr. WHITNEY. By that time I will have to go off and study it a bit.

The COURT. Has Exhibit 23 for identification been offered?

Mr. LOCKE. No. 23 and 24 have not been offered in evidence.

The COURT. Are you going to offer them?

Mr. LOCKE. Yes, if the Court please.

The COURT. All right. Show them to your adversary.

Mr. LOCKE. I am not going to offer them at this time.

Mr. WEBSTER. He is giving them back to us and we are glad to have them.

Mr. LOCKE. I now ask National Lead Company to produce copies of all sales contract forms used by National

Lead or any of its controlled subsidiaries covering the sales of all grades of titanium products manufactured by National Lead or any of its controlled subsidiaries from the date of January 1, 1920, to and including the date of the service of this subpoena. That is under paragraph 20.

Mr. REA. I hand you the sales contract forms pursuant to paragraph 20 of the subpoena.

(Marked Plaintiff's Exhibit 25 for identification.)

190 Mr. LOCKE. I offer this document, Plaintiff's Exhibit 25 for identification, in evidence.

Mr. WHITNEY. If your Honor please, I object to this on the ground of relevance. There is no charge in the complaint of any agreement about sales forms. That is a well known form of problem under the antitrust laws and was in the Paramount, First National, and other cases, and there is no charge in the complaint on any such issue.

Mr. LOCKE. There is a charge in the complaint, if the Court please, that the parties attempted to control exports; control the disposition of the goods sold to their customers. We want to know whether or not there was any such provision in any of their contracts of sales and the only way we have to prove that is to use the forms.

The COURT. Are these export sales forms?

Mr. REA. They are sales forms. I don't know how we use them. We will discover that or you will discover that when you examine them.

Mr. WHITNEY. There is no charge that the defendants agreed among themselves on the terms of export sales. There is a charge that they divided territories, but as to the terms upon which they would make their sales
191 there is no charge that they are not competitive. It is not part of the conspiracy charged. It is vitally important to us to have the case operate within the issues we have to meet.

Paragraph 39 where the conspiracy is described, and paragraph 77 where the effects of it are described, say nothing about agreement as to forms of contracts or terms of sales; nothing of that kind appears within either of those paragraphs. I have always found in these antitrust cases that the most useful thing to do in submitting them to the Court is to seek to confine the evidence within the conspiracy that is charged so that we know what we are talking about.

The COURT. Mr. Webster, have you any objection?

Mr. WEBSTER. I have no objection.

The COURT. Mr. Locke, what have you to say as to Mr. Whitney's objection?

Mr. LOCKE. If the Court please, we charge one of the means to accomplish one of the ends set out in the complaint, and one of the elements of the conspiracy, was the attempt to restrict both the import and export of the product.

The COURT. For resale?

Mr. LOCKE. For resale.

Mr. WHITNEY. Could I ask where the paragraph is, because I am not conscious of anything of the sort.

192 Mr. LOCKE. Paragraph 40 of the complaint, if the Court please, alleges the execution of what we described in our statement as the 1920 contract. And a charge in the complaint that Mr. Dixon points out, paragraph 39(c), is that defendants National and du Pont and customers purchasing from them were not to export titanium compounds from the United States except to South and Central America.

The COURT. There being no objection to competence the objection is overruled.

Mr. WHITNEY. May I see that last paragraph? What he read is precisely what I said to your Honor in my earlier suggestion; that it was charged that there had been an agreement not to export. That is paragraph 39(c) at the bottom of page 13 to which he refers, and that is what I said before. There is no charge—

The COURT. The allegation is that du Pont, National and their respective customers who purchased from them, —and he wants to prove, presumably, that these contracts will show such restriction on their face or that they do not, but in any event the documents become relevant on that issue. Maybe it won't throw much light on it, but it becomes relevant.

Mr. WHITNEY. Thank you, your Honor. That is a help to me. I had not observed that point.

193 The COURT. Exhibit 25 for identification is received in evidence against all defendants.

(Plaintiff's Exhibit 25 for identification received in evidence.)

Mr. LOCKE. I now ask for the National Lead Company, if the Court please, to produce either the original or schedules made therefrom, containing the names and addresses of the ten largest customers of National Lead Company, or any of its controlled subsidiaries purchasing TiO_2 and composite pigments in the United States, from January 1, 1930, to and including the date of service of this subpoena, giving the annual amount in tons of such

titanium products delivered to the customers so named.

Mr. REA. I now hand you, Mr. Locke, in response to request No. 21 of the National Lead subpoena a list of the ten largest customers from January 1, 1930, to October 31, 1944, broken down in terms of tons, taken from the records of the National Lead Company.

(Marked Plaintiff's Exhibit 26 for identification.)

Mr. LOCKE. We will not offer that at this time, if the Court please.

Mr. WEBSTER. May we have it back, please?

Mr. DIXON. We would like to keep it for a while.

193A Mr. LOCKE. We want to examine it. If we do not introduce it we will give it back to you.

The COURT. If you insist I will direct its return, but if you do not I think it might be convenient to let them look at it.

Mr. WEBSTER. I am quite content to have them look at it, of course.

The COURT. We have reached a point where it might be well to stop. We will resume at 2.15.

(Recess to 2.15 p.m.)

194

Afternoon Session

Mr. LOCKE. If the Court please, with the hope of expediting the progress of this trial I have thought we would change our plan of developing the case, subject to the Court's approval, by calling for these various documents, having them identified, and then at the end of the day submit them to counsel for their study before we offer them in evidence. We will probably make a little better progress that way.

The COURT. It is possible. If you want to do that I certainly have no objection. Is there any objection?

Mr. WEBSTER. I have no objection to their doing it any way they please. It takes a certain amount of time anyway with reference to these matters.

Mr. LOCKE. My only purpose in doing it that way was I thought we might expedite it. If not I am content to go along as we are.

The COURT. Suppose you go along as you were and reflect upon it. I will not direct counsel how to try the case. Your adversaries are going to have the same privilege, of conducting their side of the case any way they please providing they are within the rules. I have
195 discovered that there is more than one way of salvation and more than one way of trying a case.

Mr. LOCKE. I now ask counsel for National Lead Company to produce originals or copies of all memoranda relating to sales meetings and conferences held between any of the officials or employees of the companies named in paragraph 1 of the subpoena, including E. I. du Pont, Commercial Pigments, Krebs Pigment & Color Company, from January 1, 1920 to and including the date of the service of the subpoena, where said meetings or conferences related in any way to the titanium business of National Lead Company or any of its controlled subsidiaries.

The COURT. What paragraph is that?

Mr. LOCKE. That is paragraph 23.

Mr. REA. In response to that paragraph, we have no such records.

Mr. LOCKE. I now ask National Lead Company to produce any and all books, records or schedules made therefrom in the possession or under the control of National Lead Company showing annual production and sales of Titan Company, Inc. and Titan A/S of TiO_2 and composite titanium pigments or compounds from January 1, 1920 to and including the date of the service of this subpoena, pursuant to paragraph 22 of the subpoena.

Mr. REA. I hand you, Mr. Locke, material in 196 answer to paragraph 22 of the National Lead subpoena, and this same material is produced in answer to paragraphs 12, 18, 19 and 21 of the Titan Company, Inc. subpoena. This material consists of original records of the National Lead Company. It is the only set of records we have. They are Dr. Jebsen's reports. We need these reports ourselves to work on our own case and I suggest that we do the same thing with these reports that we did with the price lists.

Mr. LOCKE. I will ask that they be marked for identification.

Mr. WEBSTER. If Mr. Locke is through his present examination of these I would like to renew the suggestions I made this morning that the best way to handle original papers of this sort would be to have them impounded and, subject to an arrangement or an order under which a representative of the Government and a representative of the National Lead Company and, if they desire to be present, a representative of the du Pont Company would look at them and copies could be made of such portions as the government may wish.

Mr. LOCKE. I have no objection to such an arrangement, if the Court please.

The COURT. Very well.

(Marked Plaintiff's Exhibits 27 to 36 inclusive for identification.

197 Mr. LOCKE. For the Court's information these seem to be annual reports of the Titan Company, Inc. from 1930 to 1939, inclusive.

The COURT. Do you offer them in evidence? I have no curiosity about them.

Mr. LOCKE. I think, considering the suggestion of Mr. Webster; that we will not offer them at this time but will wait and select such parts therefrom as I think are appropriate.

The COURT. Very well.

Mr. LOCKE. I now ask National Lead Company to produce the original books or schedules made therefrom showing the annual exports of TiO_2 and titanium composite pigments or compounds by National Lead Company or any of its controlled subsidiaries from the United States from January 1, 1920 to and including the date of the service of this subpoena, together with the country or countries and the name of consignee to whom such exports were sent. That is under paragraph 24 of the subpoena.

Mr. REA. I hand you, Mr. Locke, the original records of the National Lead Company showing all foreign sales with all the information that we have as to what those sales were and where the material was sent. This is given to you in answer to question No. 24 of the National Lead subpoena. Here again these are the original

198 records of the National Lead Company. They are records that are in daily use by the company and I suggest that we handle these in the same way that we handled the just prior item and you will be allowed to take anything you want from those records in your case.

Mr. LOCKE. Mark them with one exhibit number, please. (Marked Plaintiff's Exhibit 37 for identification.)

Mr. LOCKE. I now ask the National Lead Company to produce the amount of royalties paid by American Zirconium Company from May 6, 1935 to the date of the service of this subpoena to Titanium Pigment Company, Inc. or National Lead Company under the agreement between Titanium Pigment Company and American Zirconium Corporation dated May 6, 1935, pursuant to paragraph 26 of the subpoena.

Mr. REA. Pursuant to paragraph 26 of the subpoena not only are there no records showing any payment from American Zirconium Company to National Lead Com-

pany of royalties, but no royalties were ever paid by the American Zirconium Company to National Lead Company.

The Court. I don't take that as proof, you understand. I assume that you gentlemen understand that the statement of counsel, if it becomes material, is to be proved one way or the other.

199 Mr. LOCKE. We understand that.

I now ask National Lead Company to produce the originals in possession or control of the National Lead Company, or copies thereof of (1) letter from L. E. Barton to G. W. Thompson dated February 15, 1932, (2) a study of Titanium Pigment Company, Inc.'s patent pertinent to American Zirconium processes made by Kaegbehn dated June 21, 1934 and (3) a letter from E. McCarty to George A. Martin, Sherwin, Williams & Company, dated February 11, 1934, all these pursuant to paragraph 28 of the subpoena.

Mr. REA. I hand you, Mr. Locke, pursuant to paragraph 28 of the National Lead subpoena the first item, a letter from L. E. Barton to G. W. Thompson dated February 15, 1932; second a study of the Titanium Pigment Company, Inc.'s patents pertinent to American Zirconium Company processes made by Mr. Kaegbehn, but I wish to state that this study is dated June 13th and not June 21st. That is the only report we can find of that date or any date near it, so I assume this is the paper you request. And, finally, a letter from E. McCarty to George A. Martin, Sherwin, Williams Company, dated February 11, 1930.

200 Mr. LOCKE. I now ask National Lead to produce the original records in possession or in control of National Lead Company indicating the title and case number of any lawsuits brought by National Lead Company, any of its controlled subsidiaries or any of its properly authorized licensees mentioned in paragraph 9 or 14 of the subpoena for the alleged infringement of any of the patents or licenses of any patents of National Lead Company named in any schedule prepared pursuant to the request made in paragraph 13 of this subpoena. That under paragraph 17 of the subpoena.

Mr. REA. That is not on the list that you gave me.

Mr. LOCKE. You remember we discussed that one time.

Mr. REA. Even so, it is not on this list. The answer is that there were no such lawsuits.

Mr. LOCKE. I now ask counsel for Titan, Inc. to produce any record book or schedule showing the extent of stock

holdings or any other financial interest of Titan Company, Inc. in any of the companies named in paragraph 1 of the subpoena, together with the original books or schedules prepared therefrom showing the date or dates of the acquisition and, if sold or disposed of, the disposition of such stock of financial interest of Titan Company, Inc. in any of the companies named in paragraph 1 of the subpoena and, if sold or disposed of, the consideration received for such stock or financial interest by Titan Company, Inc.

Mr. REA. This in response to paragraph 3 of the Titan subpoena?

Mr. LOCKE. Yes.

Mr. REA. I hand you, Mr. Locke, material prepared from Titan Company, Inc.'s records in response to question No. 3 of the Titan subpoena.

(Marked Plaintiff's Exhibit 38 for identification.)

Mr. LOCKE. We wish at this time, if the Court please, to offer in evidence Plaintiff's Exhibit 38 for identification.

The COURT. Any objection? No objection. It will be received.

(Plaintiff's Exhibit 38 for identification received in evidence.)

Mr. LOCKE. I now ask Titan Company, Inc. to produce the books, records or schedules prepared therefrom giving the names and positions of officers by the persons so named of the officers, directors and members of any executive or other official committee of the companies or associations named in paragraph 1 from January 1, 1920 or the date of the incorporation or formation of such corporation or association, whichever is later, to and including the date of the subpoena.

Mr. REA. That is in response to question 7?

Mr. LOCKE. No. 6. If I am not mistaken, you made some statement to the effect that it was produced under paragraph 6 of the National Lead subpoena, containing the information called for in paragraph 6 of the Titan Company, Inc. subpoena.

Mr. REA. That is correct. And I believe that those exhibits were marked in evidence 7 to 20.

Mr. LOCKE. I now ask Titan Company, Inc. to produce the originals or lists prepared therefrom indicating the various officers or employment held in any of the companies or associations named in paragraph 1 of this subpoena, including National Lead Company, or any director or official of the Titan Company, Inc. from the date of its

incorporation to the date of service of this subpoena, including the date of the termination, if terminated, of their official connection or employment with any of the said companies named in paragraph 1, including the National Lead Company, under paragraph 7 of the subpoena.

Mr. REA. I hand you Mr. Locke, a list compiled from the records of Titan Company, Inc., supplying the material requested in answer to question No. 7 of the Titan Company subpoena.

(Marked Plaintiff's Exhibit 39 for identification.)

203 Mr. LOCKE. We wish to offer Plaintiff's Exhibit 39 for identification in evidence at this time.

The COURT. Without objection it will be received.

(Plaintiff's Exhibit 39 for identification received in evidence.)

Mr. LOCKE. Certain documents were called for from Titan Company, Inc. under paragraphs 12, 18, 19 and 21 of the subpoena, and I understood you to say that those various paragraphs, the demands there, had been complied with under your production under paragraph 22 of the National Lead Company subpoena.

Mr. REA. That is right.

Mr. LOCKE. I ask Titan Company, Inc. to produce at this time copies of any and all sales contract forms used by Titan Company, Inc. covering the sale of all grades of titanium products manufactured or sold by Titan Company, Inc. or any of the companies named in paragraph 1 of this subpoena from January 1, 1920 to and including the date of the service of this subpoena.

Mr. REA. That is called for by paragraph 20?

Mr. LOCKE. Paragraph 20, that is correct.

Mr. REA. We have no such sales contract.

204 Mr. LOCKE. I ask Titan Company, Inc. to produce the original of any and all notes or copies thereof of any and all notes and memoranda relating to sales meetings or conferences held between any of the officials or employees of the Titan Company, Inc. and the companies named in paragraph 1 of this subpoena, from January 1, 1920 to and including the date of service of this subpoena. That is called for under paragraph 22 of the subpoena.

Mr. REA. In answer to paragraph 22 of the Titan Company subpoena, we have four files of material in our room out here, 1502, and rather than bring those files into the courtroom—they are bulky filing drawers—we will be glad to arrange with the Government to do exactly what we ar-

ranged to do under other paragraphs, and that is we will make them available, you can look at them and take whatever material you wish out of those files, provided it is done when our representative is present.

Mr. LOCKE. That is acceptable, if the Court please.

The COURT. Very well.

Mr. WHITNEY. Could I look at the Titan subpoena, which I have not seen, so that I can know what this colloquy is about?

(Mr. Locke hands to Mr. Whitney.)

Mr. WHITNEY. I just wanted to observe, your 204-A Honor, that du Pont is not in that paragraph 1.

The COURT. I really pay no attention at all to documents marked for identification. As far as I am concerned, you can arrange that with the clerk at lunch. To me it is just a process of hanging tags on papers. When you get to offering them in evidence, then I will look at them.

205 Mr. LOCKE. I now ask Titan Company, Inc. to produce the originals or schedules made therefrom showing annual imports of TiO_2 and titanium composite pigments or compounds by Titan Company, Inc., or any of the companies named in paragraph 1 of the subpoena from January 1, 1920, to and including the date of service of the subpoena, together with the name and address of the consignee to whom such import was sent, pursuant to paragraph 23 of the subpoena.

Mr. REA. I hand you, Mr. Locke, material compiled from the records of Titan Company, Inc. in response to paragraph 23 of the Titan subpoena. I would like to state for the record here that I understand that that paragraph was to be read so that we could put into it importations into the United States. Is that correct?

Mr. LOCKE. Yes. We had that understanding.

(Marked Plaintiff's Exhibit 40 for identification.)

Mr. LOCKE. I now ask Titan Company, Inc. to produce the original records or schedules made therefrom showing the amount of royalties paid by E. I. du Pont for the use of Titan Company patents or patents licensed to E. I. du Pont appearing in items 13, 14, 16, 17 and 18 of paragraph 8 of this subpoena, pursuant to paragraph 26 of the subpoena.

206 Mr. REA. I would like to point out, Mr. Locke, that that was not on the list you gave me either.

Mr. LOCKE. Well, that was an oversight on my part. Will you produce it at the earliest date?

Mr. REA. Certainly. I will have it for you tomorrow morning.

Mr. LOCKE. Now ask the Titan Company, Inc. to produce the original records indicating the title and case number of any lawsuit brought by Titan Company or any of its controlled subsidiaries or any of its properly authorized licensees mentioned in paragraphs 9 or 14 of this subpoena for the alleged infringement of any patents or licenses under any patents to Titan Company, Inc. And this may be in any schedule prepared and made pursuant to the request in paragraph 13 of this subpoena.

Mr. REA. That is not on my list.

Mr. LOCKE. But you and I discussed that and you said you would make certain representations in respect to it.

Mr. REA. I am sorry. I was busy when you were making that statement.

Mr. LOCKE. It has to do with suits for patent infringement.

Mr. REA. The answer to that is there were no
207 such suits.

Mr. LOCKE. If the Court please, we served a subpoena on E. I. du Pont as was set out in the stipulation, and I should like now to call for the documents of which I have given notice that we would want from du Pont. I should like first the stock record books or schedules prepared therefrom, showing the extent of stock holdings or any other financial interest of du Pont in any of the companies named in paragraph 1 of the subpoena from January 1, 1928, to the date of the service of the subpoena.

Mr. WHITNEY. We are preparing that. We have not quite finished it. We are checking it.

Mr. LOCKE. I should like du Pont to produce the books or records in the possession or control of du Pont, or schedules prepared therefrom, giving the names and positions of officers held by the persons so named of officers, directors and members of the board of directors or other officials or committees of the companies named in paragraph 1 from January 1, 1928, to the date of the service of this subpoena.

Mr. WHITNEY. As to that, and also 7 and 8, we are in the same position. We are far advanced and we are just checking the list we prepared.

208 Mr. LOCKE. I should like the du Pont to produce the original books or schedules prepared therefrom showing the annual production of TiO_2 and composite titanium pigments and compounds by E. I. du Pont or any of its subsidiaries in the United States engaged in the manu-

facture of TiO_2 and composite titanium pigment from January 1, 1928, to and including the date of the service of the subpoena, pursuant to paragraph 18.

Mr. WHITNEY. Herewith produced. That document also covers 22.

Mr. LOCKE. That is right.

(Marked Plaintiff's Exhibit 41 for identification.)

Mr. LOCKE. I wish to offer this in evidence, if the Court please.

Mr. WEBSTER. No objection.

Mr. LOCKE. Mr. Whitney has requested that the record show the markings on the exhibit in red pencil shall be disregarded.

(Plaintiff's Exhibit 41 for identification received in evidence.)

Mr. LOCKE. I now ask du Pont to produce the original books, or schedules made therefrom, containing a complete price list of TiO_2 and composite pigments or compounds sold by du Pont or any of its controlled subsidiaries from January 1, 1928, to and including the date of the service of this subpoena, together with the original records or books of du Pont showing the manner and method of arriving at said price lists.

Mr. WHITNEY. These are the price lists, Mr. Locke. We do not have records and books showing the manner and method of arriving at them. Here they are. There is no such a record.

(Marked Plaintiff's Exhibit 42 for identification.)

Mr. LOCKE. I wish now, if the Court please, to offer Plaintiff's Exhibit 42 for identification in evidence.

(Plaintiff's Exhibit 42 for identification received in evidence.)

Mr. LOCKE. We request du Pont to furnish a copy of any and all sales contract forms used by du Pont or any of its controlled subsidiaries covering the sale of all grades of titanium products manufactured by du Pont or any of its controlled subsidiaries from January 1, 1928, to and including the date of the service of this subpoena.

Mr. WHITNEY. Produced herewith. Unlike the National Lead set these are photostats of actual contracts, but as they are in the past we are not making any point on that.

(Marked Plaintiff's Exhibit 43 for identification.)

210 Mr. LOCKE. I wish to offer this in evidence, if the Court please.

Mr. WEBSTER. No objection to those. I assume, though, that the data with reference to particular transactions is not offered, but just the form of the contract?

The COURT. I understand it so. They are offered as forms.

Mr. LOCKE. That is correct.

(Plaintiff's Exhibit 43 for identification received in evidence.)

Mr. LOCKE. I ask du Pont to produce the original books, or schedules made therefrom, containing the names and addresses of the ten largest customers of du Pont or any of its controlled subsidiaries purchasing TiO_2 and titanium composite pigments or compounds from January 1, 1932, to and including the date of the service of this subpoena, giving the annual amount in tons of such titanium products delivered to the customer so named.

Mr. WHITNEY. Schedule herewith. In some cases we did not have ten, and in that case they are all there are. (Marked Plaintiff's Exhibit 44 for identification.)

Mr. LOCKE. I now ask du Pont to produce the original books, or schedules made therefrom showing the
211 annual exports of TiO_2 and titanium composite pigments or compounds by du Pont or any of its controlled subsidiaries from the United States from January 1, 1928, to and including the date of the service of this subpoena, together with the country or countries and the name of the consignee to whom such exports were consigned.

Mr. WHITNEY. Schedule herewith [handing].

(Marked Plaintiff's Exhibit 45 for identification.)

Mr. LOCKE. I now ask du Pont to produce the original records showing the amount of royalties paid by American Zirconium Corporation and Krebs Pigment & Color Corporation or E. I. du Pont from January 1, 1935, to and including the date of the service of this subpoena under the license agreement dated January 1, 1935, between Krebs Pigment & Color Corporation and American Zirconium Corporation. We are making a similar request with respect to royalties paid by Virginia Chemical Corporation and also a similar one with respect to royalties paid by National Lead Company or Titan Company, Inc. That is pursuant to paragraphs 26, 27 and 28 of the subpoena.

Mr. WHITNEY. We have three schedules here. May I suggest three numbers?

(Marked Plaintiff's Exhibits 46, 47 and 48 for identification.)

Mr. LOCKE. I now wish to offer Plaintiff's
212 Exhibits 46, 47 and 48 for identification in evidence.

Mr. WEBSTER. May I have the exhibits before they are marked in evidence so I can state an objection?

The COURT. I assumed you had already seen them.

Mr. WEBSTER. I have, but these are different.

Exhibits 46 and 47, which show royalties paid by American Zirconium and Virginia Chemical respectively to du Pont are objected to as immaterial and incompetent as regards National Lead.

The COURT. Wait a minute now. Incompetent—

Mr. WEBSTER. Well, as immaterial.

The COURT. I wish you would keep distinct objections on the ground of competency and relevancy and on the ground of materiality.

Mr. WEBSTER. I have tried to do that.

The COURT. I gather that competence is almost out of this case by reason of your stipulation, not entirely but almost.

Mr. WEBSTER. Well, it is. This objection is merely on the ground of materiality to these two, Exhibits 46 and 47. Now, Exhibit 48 appears to show payments by Krebs to Titanium Pigment Company, and as to that I make no such objection.

The COURT. Any other objection?

There being none, the objections made are
213 overruled and they will be received in evidence and marked Exhibits 46, 47 and 48.

(Plaintiff's Exhibits 46, 47 and 48 for identification received in evidence.)

Mr. WHITNEY. Your Honor, just so that there will be no misunderstanding, I fear we may have some competence again, particularly the hearsay rule, about some of the miscellaneous correspondence.

The COURT. Oh, of course. I was referring to authenticity and things of that character covered by the stipulation.

Mr. WHITNEY. Yes, sir.

Mr. LOCKE. Now, if the Court please, we have also asked du Pont to produce certain other documents. We have asked them to produce under paragraph 3 of the subpoena a statement indicating when du Pont bought Commercial Solvents' interest, stock interest, in Krebs Pigment Company. We have also asked for a copy of the minutes approving what we describe as the 1937 agreement between du Pont and Titan Company. We have also asked for a copy of the minutes approving what we describe as the 1937 agreement between du Pont and Titan Company, Inc. We have also asked for copies of minutes of either the boards of directors or executive committees of Grasselli and du Pont approving what we describe as the 1933 agree-

ment, and also a statement with respect to lawsuits that have been filed having to do with patent infringements.

214 Mr. WHITNEY. As to the items other than lawsuits, they were requested today and we will supply them. As to lawsuits, there have been none.

Mr. LOCKE. I am going to ask counsel for du Pont to give us some indication as to when we may expect these documents.

Mr. WHITNEY. As soon as we can reasonably prepare them. There was a request made today and we will prepare them as soon as we can.

The COURT. Very well. I will accept that statement, and if you find that an unreasonable period has gone by, you may call it to my attention and we will speak about it then.

Mr. LOCKE. Very well.

Mr. DIXON. Directing our attention now to the National Lead subpoena, we ask it to produce item 1 under paragraph 9, the same being the agreement between the Titanium Pigment Company, Inc. and Titan Company A/S, dated July 30, 1920.

I might state to your Honor that counsel for the Government and defendants have agreed that compliance with the subpoena or the request for the production of that particular item or any of the subsequent items may be met by the introduction or the use of photostatic copies of that document where they are already in the possession
215 of the Government. But we want the record to show that we are calling for the original of the document so that if the other defendant du Pont wishes to examine the original, it may be available for their examination.

Mr. WEBSTER. I think in every case, certainly in every case unless it is called to our attention otherwise, the Government has received from the files of National Lead and has been supplied with photostatic copies, and we would like an opportunity, of course, to make as rapid a comparison as we can with our own copies to be sure there is no confusion. But otherwise I think that is true of all cases.

The COURT. What is the present situation? Do you want the original or do you want simply the record to show that you asked for it?

Mr. DIXON. Well, the only thing we can do is ask for the original, your Honor, unless counsel for the defendant du Pont are willing to agree that the copies which we have—

The COURT. That is not when the problem comes up. It is when you offer it in evidence that the question comes up, and then it can come up on one of many grounds, one of them being that it is a photostat and not the original. If they desire to object on that ground then we have that objection.

216 Mr. WHITNEY. To save time, your Honor, we won't make that objection. If both the Government and the National Lead are satisfied that is a true copy that is all right for us. That is, on that one issue, the best evidence rule.

The COURT. Very well.

Mr. DIXON. I might say, your Honor, we are making available to counsel for defendant du Pont copies of all the agreements and the exhibits which we expect to offer in evidence for their inspection, with the hope that we will be able to keep the exhibits moving as quickly and as fast as possible in the interest of proceeding with the trial.

Mr. WEBSTER. I don't think there could be any delay in this respect. We have here what we think is a full set of the exhibits listed in the subpoena duces tecum and we have examined them, and all that is required is a quick comparison to be sure we have the same paper in mind when it goes into evidence or is offered.

Mr. WHITNEY. I thought he was referring to us. Could we have these copies?

Mr. DIXON. Yes, you may, Mr. Whitney. I told Mr. O'Donnell this morning that we have arranged a file here in the courtroom where you may examine all of the documents which the Government expects to offer in evidence, prior to the time that we expect to offer them in evidence.

217 Mr. WHITNEY. Your Honor, with great respect, that won't suit us at all. There are documents that the Government has had in its possession for years, as evidenced by the writings that have emerged on the subject. We have never seen them. If he gives us a copy we will take it out and most carefully study it, but we certainly can't be satisfied with going to that file cabinet when this courtroom is locked, and studying it. These documents have been described as epoch-making and world-shaking textbooks. Surely he can give us one copy. I am perfectly happy either way. If I don't have a copy I can't make waivers of the laws of evidence.

The COURT. The only directions I can give are those that the F. R. C. P. authorizes. There is no obligation on a

party to supply in advance copies of evidence unless there has been an examination before trial or a bill of particulars or interrogatories or some one of the many deviations that the rules now prescribe to prevent surprise at a trial. If you gentlemen can't work it out amicably amongst yourselves we will be here until next Christmas, I suppose, but we will be here. I have no other place to go.

218 Mr. WHITNEY. Your Honor, you are dead right if I may say so respectfully. The Court is always right. It is a most extraordinary situation. Here is a case in which they charge the du Pont de Nemours with being engaged in a world-wide cartel, and they say it is based on agreements that have been in existence since 1920.

Now the practical way to dispose of it is to give us copies of the agreements, otherwise we just have to sit here and practice law in a technical and dull way, and it is not going to do anybody any good. I wish this could be put in some of these publications.

Mr. DIXON. May it please the Court, I thought we had expressed our desire to give consideration to counsel for du Pont in giving them an opportunity in advance of the introduction of these documents to examine what we have in the interest of expediting this trial. As your Honor has stated, we have nothing else to do either except to sit here, if necessary, but we do not, however, desire, nor do we care to prolong this trial unduly. We recognize fully that defendants may not be entitled to inspect a document until we offer it in evidence. However, some of these documents, particularly the contracts, may be lengthy, as has been already indicated, and for that reason we have made them available for counsel for du Pont; and

219 the same privilege will be accorded counsel for National Lead with reference to any of du Pont's documents that may not be available.

The COURT. Let me ask you a simple question. Maybe I misconceive the situation. These contracts were alleged in the complaint, were they not?

Mr. DIXON. Correct, your Honor.

The COURT. Isn't there some rule under which parties could have had an opportunity to examine them before trial?

Mr. DIXON. The defendant du Pont could undoubtedly have filed a formal request to examine these documents.

The COURT. Did they ask for a bill of particulars and ask for the originals or the copies of these contracts annexed to them? They are probably not in the answer.

Mr. DIXON. That was not done.

Mr. WHITNEY. No, your Honor.

Will Mr. Dixon, so we could have it orderly, kindly sit down for a moment? This is very important. Then I will say my say. I have been sitting down during his. Then we will go ahead in an orderly way. Mr. Dixon, please do that. I am simply stating this—

The COURT. Will you please give Mr. Dixon a chance to conclude his remarks?

Mr. WHITNEY. Oh, I beg your pardon; certainly.

220 Mr. DIXON. Well, to get back to the subject that

I was discussing, we are willing, as I suggested, and agreeable to making these copies available in advance of introduction to counsel for du Pont. Now we made those arrangements with Mr. O'Donnell and we still stand by that arrangement if they care to make use of it. If, however, they do not care to make use of it, why then of course we have no alternative except to proceed in the regular and usual manner—call for the original documents, mark them for identification, submit them to counsel for du Pont and then offer them in evidence under the stipulation as National Lead documents which we are prepared to do.

The COURT. Does the stipulation on the part of du Pont as to photostats extend to National Lead documents.

Mr. DIXON. No, it does not.

The COURT. It applies each one to his own then.

Mr. DIXON. Correct, your Honor.

The COURT. So that practically du Pont could object to a photostat of a contract made by National Lead or to a letter, if there is no proof of signature, and so on and so forth.

221 Mr. DIXON. Well, it was our understanding that there would be no objection made by either defendant to any documents from the other party's files on that ground alone.

The COURT. The stipulation does not cover that.

Mr. DIXON. That is right.

The COURT. The stipulation applies only on the part of each defendant with his own document. Well, it looks like negotiation is in order.

All right now, Mr. Whitney.

Mr. WHITNEY. Now, if your Honor please, the reason I asked Mr. Dixon if he would be so kind as to be seated while I say this is that I think there is perhaps a misunderstanding arising due to counsel's standing up on their feet and dickering with each other.

Mr. DIXON. I assure your Honor that I had no intention of that, if that were the case.

Mr. WHITNEY. Then I was the dickerer.

Now I am asking as a practical common sense matter that we look at it with some sense of proportion. We heard yesterday a very able three-hour opening and we were repeatedly told that the foundation of the whole charge of a gigantic world-wide conspiracy was the only agreement that we are now properly talking about, what

222 was called Agreement A of 1920. And your Honor knows how much attention has been given to it before.

I am simply asking on the record whether the Government does not agree that, with some sense of proportion in this, apart from technicalities, they are prepared to hand us a copy. Alternatively, I am asking whether National Lead or Titan are prepared to hand us a copy.

It just doesn't make any sense at all to come into this court, in equity, in this year, in this great antitrust case, and play these technicalities that Mr. Dixon has been talking about, about the fundamental contract that we have never seen.

The Court. All right, we will take a short recess now. I will see trial counsel in the robing room.

(Short recess.)

223 Mr. DIXON. May it please the Court, we would like to mark for identification as Plaintiff's Exhibit A contract entered into between the Titanium Pigment Company, Inc., and Titan Company A/S dated July 30, 1920.

(Marked Plaintiff's Exhibit A for identification.)

Mr. DIXON. We would like to mark for identification as Government's Exhibit A-1 contract entered into between National Lead Company and the Titanium Alloy Manufacturing Company and the Titan Company A/S dated July 30, 1920.

Mr. WEBSTER. May we look at that just for purposes of comparison?

The Court. All he is really doing is marking a piece of paper with a number on it. It has no effect whatever. You will get a chance to look at it.

(Marked Plaintiff's Exhibit A-1 for identification.)

Mr. DIXON. We would like to mark for identification as Plaintiff's Exhibit A-2 contract between the Titanium Alloy Manufacturing Company and Titan Company A/S dated July 30, 1920.

(Marked Plaintiff's Exhibit A-2 for identification.)

Mr. DIXON. We would like to mark for identification as Plaintiff's Exhibit B contract entered into between Titan Company A/S and Societe Industrielle du Titane, dated March 3, 1927.

Mr. WEBSTER. Is that a letter?

224 Mr. DIXON. It is in the form of a contract.

(Marked Plaintiff's Exhibit B for identification.)

Mr. DIXON. We wish to mark for identification as Plaintiff's Exhibit C same being a contract between Titan Company A/S and I. G. Farbenindustrie Aktiengesellschaft dated October 3 and 20, 1927.

(Marked Plaintiff's Exhibit C for identification.)

Mr. DIXON. We wish to mark for identification Plaintiff's Exhibit C-1 same being a contract entitled "Partnership Contract B" between Titan Company A/S and I. G. Farbenindustrie Aktiengesellschaft signed June 24 and October 20, 1927.

(Marked Plaintiff's Exhibit C-1 for identification.)

Mr. DIXON. We wish to have marked for identification as Plaintiff's Exhibit C-2 contract marked "C" between the I. G. Farbenindustrie Aktiengesellschaft, g.m.b.h. signed October 3, 1927.

(Marked Plaintiff's Exhibit C-2 for identification.)

Mr. DIXON. We wish to have marked for identification as Plaintiff's Exhibit C-3 contract marked "D", license agreement between Titan Company A/S and Titangesellschaft, g.m.b.h., dated October 3 and 30, 1927.

(Marked Plaintiff's Exhibit C-3 for identification.)

Mr. DIXON. We wish to have marked for identification as Plaintiff's Exhibit C-4 contract lettered
225 "E", an agreement between Titangesellschaft, g.m.b.h., and the I. G. Farbenindustrie Aktiengesellschaft dated October 3, 1927.

(Marked Plaintiff's Exhibit C-4 for identification.)

Mr. DIXON. We wish to have marked for identification as Plaintiff's Exhibit C-5 contract lettered "F", the same being an agreement between Titangesellschaft, g.m.b.h., and I. G. Farbenindustrie Company dated October 3, 1927.

(Marked Plaintiff's Exhibit C-5 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit C-6 contract lettered "G", an agreement between Titangesellschaft, g.m.b.h., and I. G. Farbenindustrie Company signed October 3, 1927.

(Marked Plaintiff's Exhibit C-6 for identification.)

Mr. DIXON. We wish to mark for purposes of identification as Plaintiff's Exhibit C-7 contract lettered "H", an agreement between Titangesellschaft, g.m.b.h., and the Titan Company A/S dated 3 and 20, 1927.

(Marked Plaintiff's Exhibit C-7 for identification.)

Mr. DIXON. We wish to mark for purposes of identification as Plaintiff's Exhibit C-8 contract lettered "J", an agreement between Titangesellschaft, g.m.b.h. and the Titan Company A/S dated October 3 and 20, 1927.

(Marked Plaintiff's Exhibit C-8 for identification.)

Mr. DIXON. We wish to mark for purposes of identification Plaintiff's Exhibit C-9, the same being an agreement extending the license field as defined in Plaintiff's Exhibit A for identification executed on or about January 15, 1939.

Mr. WEBSTER. I am not certain about the date and I am not so certain about the characterization, but all I can say is we have a copy.

The COURT. It does not make any difference.

(Marked Plaintiff's Exhibit C-9 for identification.)

Mr. DIXON. We wish to mark for purposes of identification Plaintiff's Exhibit D, the same being an agreement dated March 23, 1929 between Titan Company, Inc. and Titan Company A/S.

(Marked Plaintiff's Exhibit D for identification.)

Mr. DIXON. We wish to mark for identification as Plaintiff's Exhibit E, agreement dated January 1, 1933 between the Titanium Pigment Company, Inc. and the Krebs Pigment & Color Corporation.

Mr. WHITNEY. That is admitted in the answer. It is set forth verbatim.

The COURT. Well, it might be one and not the other.

I will receive it. Anyway, it has not been
227 offered in evidence, only for identification.

(Marked Plaintiff's Exhibit E for identification.)

Mr. DIXON. We wish to mark for purposes of identification as Plaintiff's Exhibit E-1, the same being an agreement dated January 1, 1936 between Titanium Pigment Company, Inc. and Krebs Pigment & Color Corporation.

(Marked Plaintiff's Exhibit E-1 for identification.)

Mr. WEBSTER. That appears to be a du Pont document of which we have no copy.

Mr. WHITNEY. I don't know whether your Honor recalls.

but that is the year affiliated returns were eliminated, when all the corporations eliminated these subsidiaries so as not to pay a double tax on dividends. That is why you have all these 1936 payments.

Mr. DIXON. We wish to mark for purposes of identification Plaintiff's Exhibit E-2, the same being a contract dated October 31, 1936 between Titanium Pigment Company, Inc. and the National Lead Company.

(Marked Plaintiff's Exhibit E-2 for identification.)

Mr. WEBSTER. Did you read all the parties to that?

Mr. DIXON. E. I. du Pont Nemours and Company is a party to that document also.

We wish to mark—

Mr. WEBSTER. Will you wait just a second?

228 Mr. DIXON. Yes. That is the agreement whereby National took over the assets of Titanium Pigment Company approved by du Pont.

Mr. WEBSTER. The only reason for confusion is that we arranged our papers in accordance with the items in the subpoena and it is just holding us up a little. We will try to find those documents.

The COURT. We have reached the hour of 4.30. We will recess until tomorrow morning.

(Adjourned to December 6, 1944, at 10.30 a.m.)

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, *December 6, 1944, 10:30 a.m.*

Trial resumed.

Mr. DIXON. May it please the Court, I believe when we adjourned yesterday we had introduced for purposes of identification Plaintiff's Exhibit E-2:

We now wish to have marked for purposes of identification Plaintiff's Exhibit E-3, the same being a contract between National Lead Company and the defendant du Pont de Nemours & Company, dated January 1, 1941, an amendment to the 1933 agreement.

(Marked Plaintiff's Exhibit E-3 for identification.)

Mr. DIXON. We wish to have marked as Plaintiff's Exhibit F an agreement between Imperial Chemical Industries, Ltd., Imperial Smelting Corporation, Ltd., Goodlass Wall & Lead Industries, Ltd., and Titan Company, Inc., dated February 16, 1933.

(Marked Plaintiff's Exhibit F for identification.)

Mr. DIXON. We wish to have marked for identification as Plaintiff's Exhibit F-1 license agreement dated March 10, 1933, between Titan Company, Inc. and British Titan Products, Ltd.

230 (Marked Plaintiff's Exhibit F-1 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification Plaintiff's Exhibit F-2, the same being license agreement dated March 10, 1933, between ICI, ISC, Goodlass Wall, GW, and British Titan Company, Inc.

(Marked Plaintiff's Exhibit F-2 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit F-3 an agreement dated March 10, 1933, between Titan Company, Inc. and British Titan Products Company, Ltd.

(Marked Plaintiff's Exhibit F-3 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit F-4 agreement dated March 10, 1933, between Titan Company, Inc. and British Titan Products Company, Ltd.

(Marked Plaintiff's Exhibit F-4 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit F-5 agreement dated March 10, 1933, between British Titan Products Company, Ltd. and R. W. Greeff & Company, Ltd.

231 (Marked Plaintiff's Exhibit F-5 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit F-6 agreement dated March 10, 1933, between Titan Company, Inc. and British Titan Products Company, Ltd.

(Marked Plaintiff's Exhibit F-6 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit F-7 agreement dated February 17, 1939, between British Titan Company, Inc. and Titan Company, Inc.

(Marked Plaintiff's Exhibit F-7 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification Plaintiff's Exhibit G, the same being an agreement between Titan Gesellschaft and Aussig. I am using there the shorter names. It is dated November 23rd and December 2, 1933.

(Marked Plaintiff's Exhibit G for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit G-1, the same being a

contract entitled "Contract No. 4" between Titan Company, Inc., Thann & Mulhouse, Terres Rares and Societe Industrielle, dated June 5th and June 7, 1935.

(Marked Plaintiff's Exhibit G-1 for identification.)

232 Mr. Dixon. I wish to have marked for purposes of identification Plaintiff's Exhibit G-2, the same being contract entitled "Delivery Contract," between Societe Industrielle, Terres Rares, Thann & Mulhouse, and Titan Company, Inc., dated June 5 and 17, 1935.

(Marked Plaintiff's Exhibit G-2 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit G-3, contract number 6, same being an agreement between Titan Company, Inc., Thann & Mulhouse, Terres Rares, Titangesellschaft, Societe Industrielle and Montecatini, dated June 5 and October 26, 1935.

(Marked Plaintiff's Exhibit G-3 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit H, an agreement between Titan Pigment Company, Inc., and American Zirconium Corporation, dated May 6, 1935.

(Marked Plaintiff's Exhibit H for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit H-1, an agreement dated May 6, 1935, between Titanium Pigment Company, Inc., American Zirconium Corporation, the Glidden Company, and Metal & Thermit Corporation.

(Marked Plaintiff's Exhibit H-1 for identification.)

233 Mr. Dixon. We wish to have marked for purposes of identification Plaintiff's Exhibit H-2, contract dated May 6, 1935, between National Lead Company, Titanium Pigment Company, Inc., the Glidden Company, Metal & Thermit Corporation and American Zirconium Corporation.

(Marked Plaintiff's Exhibit H-2 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit I, agreement dated January 1, 1935, between Krebs Pigment and Color Corporation, and American Zirconium Corporation.

(Marked Plaintiff's Exhibit I for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J, a pool agreement between Titan Company, Inc., Terres Rares, the I. G. Farbenindustrie Company, dated January 18, 1936.

(Marked Plaintiff's Exhibit J for identification.)

Mr. Dixon. On this exhibit we regret we seem to have

only one copy here, so we will have to ask counsel to use the one we are marking.

We wish to have marked for purposes of identification as Plaintiff's Exhibit J-1, Agreement B, dated January 18, 1936, between Messrs. Kokusan Kogyo and Doitsu.

(Marked Plaintiff's Exhibit J-1 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-2, guarantee agreement between Doitsu, Titan Company, Inc., I. G.

234 Farbenindustrie, Titan Gesellschaft, Terres Rares and Thann & Mullhouse, dated January 18, 1936.

(Marked Plaintiff's Exhibit J-2 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-3, license contract C between Kokusan Kogyo and Titan Kogyo. This agreement is dated January 6, 1936, although that may not be quite the accurate date of this contract, but that is what it appears to have been.

(Marked Plaintiff's Exhibit J-3 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-4, license agreement D, between Doitsu as Trustee for Titan, Inc., I. G. Farbenindustrie and Titangesellschaft. This agreement is dated June 1, 1936.

(Marked Plaintiff's Exhibit J-4 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-5, minutes of agreement between Titan Kogyo and Kokusan Kogyo, marked E. There is no date on this particular document.

(Marked Plaintiff's Exhibit J-5 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-6, agreement or minutes marked F, the same being minutes for agreement between Titan Kogyo and Kokusan Kogyo K.K., also undated.

235 (Marked Plaintiff's Exhibit K-6 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit J-7, letter by Mr. J. Blumenfeld to Titan Company, Inc., dated January 20, 1936, and as Plaintiff's Exhibit J-8, an acknowledgment of this letter from Mr. Blumenfeld by Titan Company, Inc., dated February 4, 1936.

(Marked Plaintiff's Exhibits J-7 and J-8 for identification.)

Mr. Dixon. We wish to have marked for purposes of

identification as Plaintiff's Exhibit K, agreement dated January 1, between Canadian Industries, Ltd., and National Lead Company.

(Marked Plaintiff's Exhibit K for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit K-1, an agreement between National Lead Company and Canadian Titanium Pigments Company, dated January 1, 1937.

(Marked Plaintiff's Exhibit K-1 for identification.)

236 Mr. Dixon. We wish to have marked for purposes of identification Plaintiff's Exhibit K-2, an agreement between Canadian Industries, Ltd. and Canadian Titanium Pigments, Ltd. dated January 1, 1937.

(Marked Plaintiff's Exhibit K-2 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification Plaintiff's Exhibit K-3, an agreement between National Lead Company and Canadian Titanium Pigments Company, Ltd., dated January 1, 1937.

(Marked Plaintiff's Exhibit K-3 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification Plaintiff's Exhibit K-4, the same being an agreement between Canadian Titanium Pigments Company, Ltd. and British Laport, Ltd., dated January 4, 1937.

(Marked Plaintiff's Exhibit K-4 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit K-5 an agreement between National Lead Company and Canadian Titanium Pigments, Ltd., dated February 27, 1939.

(Marked Plaintiff's Exhibit K-5 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit L an agreement dated August 5, 1937 between du Pont de Nemours and Company and Virginia Chemical Corporation.

(Marked Plaintiff's Exhibit L for identification.)

237 Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit M an agreement between du Pont de Nemours and Company and Titan Company, Inc., dated July 27, 1937.

(Marked Plaintiff's Exhibit M for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit N a license agreement between du Pont de Nemours and Company and Titan Company, Inc., dated June 20, 1938.

(Marked Plaintiff's Exhibit N for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit O an agreement be-

tween National Lead Company and Titan Company, Inc., dated March 28, 1939.

(Marked Plaintiff's Exhibit O for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit P a license agreement from International Pulverizing Corporation to National Lead Company, dated April 10, 1939.

(Marked Plaintiff's Exhibit P for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit P-1 an agreement between National Lead Company and du Pont de Nemours and Company, dated April 14, 1939.

(Marked Plaintiff's Exhibit P-1 for identification.)

238 Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit P-2 an agreement between National Lead Company and American Zirconium Corporation, dated December 19, 1940.

(Marked Plaintiff's Exhibit P-2 for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit Q, the same being a cross-license agreement, dated April 21, 1939, between du Pont de Nemours and Company and Titan Company, Inc.

(Marked Plaintiff's Exhibit Q for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit R a cross-license agreement between du Pont de Nemours and Titan Company, Inc., dated May 10, 1940.

(Marked Plaintiff's Exhibit R for identification.)

Mr. Dixon. We wish to have marked for purposes of identification as Plaintiff's Exhibit S a cross-license agreement between du Pont de Nemours and Company and Titan Company, Inc., dated June 23, 1941.

(Marked Plaintiff's Exhibit S for identification.)

Mr. Dixon. Pursuant to the stipulation, your Honor, between the parties in this case we now propose to offer as part of the Government's case Plaintiff's Exhibit A for identification in evidence and to offer it against defendants Titan Company, Inc., National Lead Company and the defendant du Pont de Nemours and Company.

239 Mr. WEBSTER. The National Lead Company does not object to the receipt in evidence of the 1920 agreement marked Government's Exhibit A for identification. However, if and when the document is received in evidence I should like to make two brief observations which I think will be in the interest of precision.

The COURT. Very well. Any objection, Mr. Whitney?

Mr. WHITNEY. If your Honor please, if you will allow me a few moments: We greatly appreciate the efficiency this morning, we covered an enormous amount of ground here, and we also appreciate receiving those contracts last evening, on your Honor's suggestion, and we did go immediately to considerable expense—we immediately got the printer over and we printed the whole lot, and that enabled the six of us to read them last evening. We will hand copies to your Honor and the Government and Mr. Webster in case you want to use them.

Now as to Exhibit A, there is a small point—I merely call it to the attention of the parties—and that is there seemed to be schedules to it, there seemed to be three schedules, and they are not annexed. And I should think that under what is sometimes called the complete evidence rule 240 it will be necessary to have those schedules annexed. They seem to be of some importance as, among other things, they are lists of patents.

Now as to du Pont's position on that contract, we raise no point about relevance. That contract appears to deal with what might be called worldwide relations, and I take it that is the subject matter of this case.

We make no point of materiality because it is a basic contract between the other two defendants, and of course if later we come into whatever relationship there was that was caused by that contract, it would be highly material. It is the relationship of course that the Government described as a conspiracy, a violation of Section 1, and Mr. Webster I take it says it is a reasonable agreement.

Now also, your Honor, we make no objection on the grounds of the best evidence rule or other authenticity. We make only one objection and we do object to it on one ground, and one ground only, and that is that there is no connection with du Pont. And I could state it in two ways—on the face of the contract du Pont does not appear and no evidence has been offered to in any way connect du Pont to that contract. So we object to it.

The COURT. What about the schedules, Mr. Dixon.

Mr. DIXON. May it please the Court, it is entirely possible that the copy which was offered in evidence 241 inadvertently or otherwise did not include the schedules. I believe there was one of the copies, a list of some patents attached to it, and we will recheck with what we have and if that be the case we will see that those schedules are attached to the copy which has been offered so that it will be as complete a document as we have.

The COURT. In other words, you do not intend to withhold from the proof those schedules?

Mr. DIXON. Certainly not.

The COURT. Your explanation is that if there are schedules you want to offer them.

Mr. DIXON. Absolutely.

The COURT. And with that understanding I understand this is subject to the omissions rule.

Mr. WEBSTER. If the Government does not have them, and I believe they have them, if they have not them available we will supply them.

The COURT. As to the other objection of du Pont, of course that undoubtedly will be repeated, and repeatable if not repeated, with respect to a great deal of this material until we get to fairly recent times. I have not reflected

the thing through, but it occurs to me as a practical matter the objection which is taken in the form of an objection to evidence really is also an objection of substance to the whole theory of the case. I think we will get nowhere as a practical matter if I say now that it is ruled out subject to a motion to make it applicable when, as and if the conspiracy is proved or the connection is proved with du Pont. I think it would be simpler if I let it in, reserving to du Pont a motion to strike out or in any event to argue, as undoubtedly will be argued when the case is concluded, that the Government's case has not been established because no connection has been shown between the 1920 agreement and du Pont.

I say that for the reason (a) I am going to let it in as against National Lead and Titan, no objection having been taken, (b) under the rules even if both parties objected and even if I sustain the objection the Government could ask to have it marked in the case for the purposes of being available for review purposes. All in all, I think the balance of convenience as it strikes me lies in favor of letting this material in as it goes along and to treat the question of materiality and relevance and relationship to the parties subsequently either by a motion to strike or argument on the merits. I think either one can raise the question.

So with that comment, merely tentative and preliminary and something with respect to which I might change my mind in the course of the trial, because it sometimes happened that we give a plaintiff in a conspiracy case considerable leeway on the general understanding that he will connect, yet sometimes in the course of the trial the Court feels that the opportunity has been had and should have been embraced and having not

been embraced no further opportunity should be afforded; but at this stage I think I shall overrule your objection subject to the provisions I have indicated.

Mr. WHITNEY. Thank you, your Honor. I think I understand. I think that same point would run from A through D, with their respective sub-numbers.

The COURT. As a matter of fact you need not state your objection in each case because I will reserve you an objection to strike all of this material and, for that matter, even if you had no objection and the evidence goes in without objection, if at a later time it appears that it is not material and not relevant you can then move to strike. Because it seems to me that here exclusion and merit are very much on the same character, especially since you are not dealing with a jury. I will have to pass upon the relevance of these

contracts by passing on the substantive question and
244. evidentiary question as to whether one or the other of the parties ever did become a party to this scheme.

It is simply another handle to the same door, it seems to me. So that the only effect of my not excluding it of course is that you will want to take advantage of the opportunity to cross examine with respect thereto which otherwise you would of course not be entitled to if the evidence was excluded as against you. I think it would be better if you were given that opportunity if there should be occasion for cross examination or to introduce evidence in contravention of it, such as conceivably the introduction of another copy of the agreement which you profess to be a more accurate copy or a different translation. Different issues of that character may arise which you would not have an opportunity to deal with if the evidence was excluded as against you, but which you would have an opportunity to present material when I treat the matter in the way I am now treating it.

Plaintiff's Exhibit A in evidence.

(Plaintiff's Exhibit A for identification received in evidence.)

245 Mr. WEBSTER. Your Honor, I said I had two brief observations about the exhibit just received in evidence. The first is to recall now the fact, which has been referred to rather loosely before, namely, that this is a contract between the Titanium Pigment Company and the Norwegian Company, Titan A/S. The Titanium Pigment Company has now been completely absorbed by the National Lead Company and has been dissolved. 87 per cent of the stock of Titan Company A/S is owned by the

National Lead Company, and all of the stock of Titan Company, Inc., a Delaware company, is owned by the National Lead Company. It will appear here that the rights, certain rights, of the Norwegian company under these contracts, or under certain of these contracts, were transferred subsequently to Titan Company, Inc., including rights under this so-called 1920 contract. So that this is really a case of the Lead Company now having been in the position of having a contract with itself, and to that extent the contract has long since ceased to have any executory force.

Now I am aware of the fact that the Government will maintain there is a certain pattern established by the contract, Article XIV of the contract, which has been carried over into other agreements, and that will develop as
246 the evidence comes in, but I just thought it be helpful to make it clear that with that exception I believe your Honor will find that that contract is at least dormant, if not extinguished.

The second point is this: that on page 10 of the exhibit, under paragraph 2, there is a note. I might say first that in paragraph 2 there is a provision, the general purpose of which is to carry out the territorial features of the contract by providing that each party nominates the other as agent in respect of any shipments into the territory, so-called, of the other party. And in connection with that there is this note:

"N. B. Inasmuch as it is the purpose of this agreement to provide for the widest possible development of titanium products, it is understood and agreed that notwithstanding the agencies created by this Clause C importations into the territory of the agent may be made of finished articles in the manufacture of which titanium products produced by the principal or a licensee or sub-licensee thereof have been used as raw material, provided, however, that the same shall not constitute such an important part of such finished article that its sale within the agent's territory will substantially interfere with said agent's sales of its own said titanium products in its said territory, and

247 each party principal agrees that it will upon receiving notice from the other party's agent that such importation into its territory of such finished articles does interfere with the agent's sale of its own product endeavor to prevent such importation, and each party agrees that it will not sue the other or any purchaser from or customer of, direct or indirect, of the other on account of the importation into, or sale and use, in its territory of

any such finished articles until after six months from the time such notice shall have been given to the other."

Now a provision somewhat similar to that appears in some of the other contracts that the Government has indicated that it may offer, and I want to say just this about that provision: It will appear here that that provision has never had any force or effect; that it has never been enforced, and I now, in the name of the National Lead Company and Titan Company, Inc., to the extent that it may be said that this provision has potential force or capacity for execution in the future, relinquish and disclaim any such effect.

The COURT. Very well.

(Plaintiff's Exhibit A for identification received in evidence.)

248 Mr. DIXON. I might say, your Honor, that I have here a little better copy. I don't know whether the one you have is clear.

The COURT. Let us arrive at an understanding. If you want me to have the originals of the exhibits, then I would rather keep the originals though they may be bad. Or, if you are going to supply me with a copy of the exhibits, supply me with a set of copies and keep the originals yourselves. Otherwise you will find yourself, as I know from that provision: It will appear here that that provision has sad personal experience, on a constant hunt for exhibits, and not knowing where they may be located, it becomes a very troublesome problem. Therefore I suggest to you that I will suffer such inconvenience that may result of the first procedure; or I will follow the other method, whichever you prefer.

Mr. DIXON. May I suggest that it is the Government's intention to permit all the documents introduced in evidence to remain available to the Court at all times. In other words, we have our own working copies, so that these contracts and other exhibits that are offered will be made available and you may keep them and do whatever other things you may care to do with them.

249 Mr. WEBSTER. May I make a suggestion on that: The du Pont Company has gone to the trouble of having these documents printed. Now I have not taken up the question with my client about sharing in this enterprise, but I am sure I am authorized to say that we will share in it.

Furthermore, it seems to me that if that is to be done, an arrangement can be made whereby the proof as it comes

from the printer is compared by someone representing du Pont, and say Mr. Hendricks representing National Lead, and Mr. Caplan and Mr. Jacobs, with the documents put in evidence, the originals, that that can then be formed as the official copy for purposes of discussion and examination, and the time of all of us will be greatly saved and the case will be advanced.

The COURT. Very Well. That is very satisfactory, and if you will undertake in addition to what you said you would do, to mark the printed text with the exhibit number, then I can refer to it from the record.

Mr. WEBSTER. I think it ought to be perfectly clear that the printed copy is an exact copy of the original exhibit received in evidence.

The COURT. What I mean is so far as this document I have received from Mr. Whitney is concerned of course it was printed before numbers were assigned, so it does not bear the exhibit number.

Mr. WEBSTER. That is right. The next proof, I think, will be an exact copy of the exhibit, showing the
250 number.

Mr. WHITNEY. I think I might say a couple of little things that may help first of all to you and Mr. Dixon and Mr. Webster; that in our checking with another text, checking on the reading of several documents, we found things that must be misprints, apparently, but they were that way in the original. The printer called them to our attention after midnight, but we found they were in the original. I can say that we are very grateful to be asked to participate in that proof reading, but we will decline. I do not want to. We will accept anything that National Lead and the Government say about the authenticity of these documents. We do not really mean to mingle in it and they can do it in their own way and we will accept it.

The COURT. I suppose you expect to have that done only with respect to your principal exhibits. You do not propose to print every scrap of paper that is offered?

Mr. WEBSTER. I think we had better wait and see how this works out.

Mr. WHITNEY. As to the other exhibits, your Honor, I suppose that Mr. Dixon will, and we will be grateful, if he can give us copies. I know he will wherever he can. Where he cannot if he will just let us have the
251 originals we will copy them, either in type or printing as we think fit, but we would like to have the other exhibits.

The COURT. Is there going to be a further proof of this, Mr. Whitney? If there is not I will just keep this.

Mr. WHITNEY. Yes, we will have them today. I just did not take the time yesterday.

The COURT. Do you intend to annex the exhibit numbers to them?

Mr. WEBSTER. I think the numbers ought to be attached to them so they can readily be identified.

The COURT. Yes. Otherwise you will find yourself using cross-indexes and it becomes troublesome. In other words, the utility of these documents will be enhanced if you have the exhibit numbers.

We will take a short recess.

(Short recess.)

252 Mr. WHITNEY. Your Honor, I mentioned to Mr. Dixon that we just received one of the answers to the subpoena. Your Honor will remember we did not have them all yesterday, and in answer to paragraph 3—

Mr. LOCKE. May I interrupt and suggest that we continue to develop the contracts and then we will get all of these things together.

Mr. WHITNEY. I apologize to you, Mr. Locke. I spoke to Mr. Dixon and I said I would do this.

Mr. LOCKE. I just talked to Mr. Dixon and we think it would be more orderly if we waited and get all of these things in together.

Mr. DIXON. May it please the Court, I have a few more of these exhibits connected with the contracts that we wish to identify. We did not have available any copies when they were being offered in order. So that at this time I wish to have marked for purposes of identification as Plaintiff's Exhibit B-3, a letter dated March 22, 1939, from Titan Company, Inc., to Charles F. Kaegebehn, Esq. (Marked Plaintiff's Exhibit B-3 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit B-4, letter dated February 17, 1939, from Titan Company, Inc., to Societe Industrielle, a letter dated March 10, 1939, attached thereto, as one exhibit.

(Marked Plaintiff's Exhibit B-4 for identification.)

Mr. DIXON. We wish to have marked for purposes of identification as Plaintiff's Exhibit D-1, letter to Evans McCarty from Jebesen, dated August 9, 1929, with letters attached thereto from TG to Titan A/S, dated June 15, 1929, and from IG to Titan A/S, dated June 15, 1929.

(Marked Plaintiff's Exhibit D-1 for identification.)

MR. WEBSTER. We have a great many documents outside but not here presently. If Mr. Dixon could just indicate to us in advance the subpoena numbers of the papers he wants us to have here ready for examination, it would facilitate matters.

MR. DIXON. There are very very few of these, your Honor.

THE COURT. I am sure you will try to work it out to the best convenience of all parties.

MR. DIXON. While we were on the contracts I thought we would identify all the pertinent exhibits connected therewith at the moment.

We wish to have marked for purposes of identification as Plaintiff's Exhibit D-2, subject to securing the correct date on it from the production of the document, a draft of a letter from Titan, Inc., to Titan A/S.

254 (Marked Plaintiff's Exhibit D-2 for identification.)

MR. WHITNEY. Just before we leave D-2, the subpoena refers to it as a letter from Titan, Inc. to Titan A/S, and it is a blank page.

MR. DIXON. I understand. We have not subpoenaed it yet. We are perhaps a little out of order. This is just our file copy.

There is just one more item, your Honor, under that that we will put in at a later date and which will complete that portion of it.

255 MR. DIXON. I now wish to refer to Plaintiff's Exhibit A, which was described on the chart No. 4 as the 1920 agreement between Titanium Pigment Company, Inc., and Titan Company A/S. Your Honor will recall that Titan Company A/S was the Norwegian company owning patents in Norway and the United States relating to the production of titanium pigments; that in the United States Titanium Pigment Company was the American company, a subsidiary of National Lead, engaged in the same business; that this contract was entered into between the two companies on July 30, 1920.

There are many provisions in this contract that I wish to refer to and to point out and to bring to the attention of the Court, for they appear in substance in many of the other contracts which we will subsequently present in evidence and which we will again discuss at that time. We have heretofore submitted to your Honor and counsel for the defendants in a general way a brief summary of some of the provisions of this contract which, we point out in this memorandum, appear in the other exhibits which we

will subsequently introduce. In other words, it is one of the contentions of the Government that this contract is a pattern or shows in future contracts what the parties intended in carrying out the conspiracy and combination in just a few ways referred to in this contract.

I will therefore endeavor to analyze it from that point of view and will refer at the outset to paragraph 1 of the contract which describes the Licensed Field in which the parties were to operate. In other words, that describes in substance the scope of the combination by referring to and describing that which is covered in substance by the combination, and particularly in this agreement.

The Licensed Field in definition (a) under paragraph 1 of "Definitions", your Honor will note is a broad one and includes "all substances, materials, or compositions consisting of or containing above two per cent of titanium, or a compound, or compounds thereof?"

The COURT. "Two per cent of titanium," is that a misprint?

Mr. DIXON. That is a misprint. It should be "two per cent of titanium."

Mr. WHITNEY. I beg your pardon. That is not so. I believe it is just that way in the original.

Mr. DIXON. Well, I can see, your Honor, that we will have to—

Mr. WEBSTER. I have "or" in my copy. I must say, to make sense—

The COURT. It says "or". It probably should be "of".

Mr. WEBSTER. To make sense, the word should be read "of." I don't think we ought to quibble about it.

The COURT. There is another verbal difficulty a few lines down, but I suppose that is just the way it was written. It says "and processes useful in the obtainment or manufacture or use of said substances, materials, or compositions in so far as said substances, materials, or compositions in so far as said apparatus"——

Mr. WEBSTER. I think your Honor will find a great many verbal infelicities, and even more so later when we start to deal with some rather liberal translations.

The COURT. Was this agreement originally in another one?

Mr. WEBSTER. No. So far as I know this is the form in which it was signed.

The COURT. All right. Go ahead. The agreement says "or" but it means "of". All right.

Mr. DIXON. "unless such substances, materials or compositions contain by weight more than 5 per cent of a metal other than titanium in its purely metallic"—as described in this contract it means "chemically uncombined state, and also to be included all apparatus, methods, and processes useful in the obtainment or manufacture or use of said substances, materials, or compositions in so far as said apparatus, methods, and processes may be employed in the production of said substances, materials or compositions excepting as aforesaid."

Mr. WEBSTER. That does not conform.

The COURT. You skipped a line.

Mr. WEBSTER. You see, our friend is reading from a copy which he seems to have had buried in his files yesterday that he didn't know he had, and it does not conform with the copy that has been put in evidence. I don't think this is—

Mr. DIXON. Now just a moment. I do not know just what counsel for the defendant means when he says "buried" in our files. We have endeavored to cooperate with counsel—

The COURT. Well, gentlemen, we can waste a lot of time with byplay. In a short two-day trial a little of it helps; but in a long trial of this character I think we should forget about the byplay and forego some opportunities for repartee. I think it would be better. Even the Court will restrain itself.

Mr. DIXON. What I was endeavoring to say was that perhaps these copies should be compared with the original.

259 The COURT. Why not read from the exhibit? Have you the exhibit?

Mr. DIXON. I thought your Honor had that. I intended that you should have.

The COURT. You take it.

Mr. DIXON. What I wanted to point out to your Honor with reference to this paragraph was the broad definition of the Licensed Field. That is material in one sense, because, as we shall point out in subsequent contracts and agreements, that was extended even beyond the definition of the Licensed Field here in 1939, in an effort to provide a uniformity in definition, and also for other reasons which we will indicate.

The COURT. These are supplemental openings and I do not treat them as evidence.

Mr. WEBSTER. Your Honor, I thought my friend had made his opening the other day.

Mr. DIXON. If the Court please, I may have occasion however to say this several times during the trial. Obviously, your Honor knows that it is not evidence until it is produced. I am merely stating this so that your Honor can have before you the development of this case from the Government's point of view, and if we do not produce evidence to sustain what I state, why then we are
260 properly subject to criticism. But I think this being a court of equity that it certainly can and perhaps may be helpful, and it is only with that thought in mind, that we will make any comments or remarks with regard to any provision in any of these contracts.

Mr. WHITNEY. If we want to comment in turn it is my understanding that that will be acceptable, as if it were direct examination and cross-examination.

The Court. I think I already indicated that. I indicated yesterday that if you gentlemen desire you may comment or call the Court's attention to specific provisions in these exhibits, not because that is the usual course of a trial but because of the number of exhibits here, and I thought it might be helpful. That, I said, meant that the Government can do so and immediately although not in the course of defendants' case, but immediately, counsel for the other side may make a comment or call the Court's attention to other and additional paragraphs in the exhibit so that I can follow it from day to day. If we find after a little experimentation that that slows us down, undoubtedly we will stop it.

Go ahead.

Mr. DIXON. Also in paragraph 1 the territory of the respective parties to the agreement is defined and that allocated to co-conspirator Titanium Pigment Company
261 is North America, which is then defined specifically to include the entire continent, the Dominion of Canada, Newfoundland, and all Central American states. Then South America is defined in sub-paragraph (c) as including all countries located to the south of Panama,—in other words, a generally understood designation I believe for what we call South America.

Then the definition is given of "Finished Article", which is referred to throughout these contracts as including "any artificially produced article, or composition, within the 'Licensed Field' which has been manufactured by aid of any process, or apparatus, or both, so as to constitute

a cohesive intermixture of titanic material with other material with which such titanic material was not previously intermixed, or associated, as for example, in paint, rubber, glass."

And that, as we pointed out yesterday shows in substance the use, among other things, to which titanium pigments may be put.

-Paragraph 2 of the contract then gives to Titan from Titanium Pigment Company an exclusive license of all patents which the Titanium Pigment Company may have or acquire to manufacture and to use or sell under said patents in any territory outside of North America, but

262 Titan—that is Titan A/S—is prevented in this paragraph from making any sales either directly or indirectly in the territory of Titanium Pigment Company. There is a subsequent qualification of that as we will point out in a moment, with regard to where such sales are made they are made under the exclusive agency provision of the contract.

In paragraph III Titan Company gives to the Titanium Pigment Company the same privileges.

The Court. By Titan Company, you mean Titan A/S?

Mr. Dixon. That is right, your Honor.

The Court. Let us call it that.

Mr. Dixon. Titan A/S. (Continuing.) Gives to the Titanium Pigment Company an exclusive license to use, manufacture or sell under any patents which Titan A/S has or may acquire. But that license is limited to North America, as defined in the contract. And the Titanium Pigment Company obligates itself not to make any sale either directly or indirectly outside of North America or South America.

Now, paragraph IV then proceeds to give to each party, I mean by reciprocal arrangement non-exclusive licenses under any patents then owned or which might thereafter be acquired in South America. But in exercising the license in South America neither party is permitted
33. to make any sales directly or indirectly in or for any territory outside of South America.

Paragraph V relates to the matter of handling patent applications and the filing of those applications. In other words, this was a cross-license agreement of present and future patents, and each party was obligated to give to the other licenses on any patents that they may acquire in the future, and of course that would involve the filing of patent applications. So that this section of the con-

tract—there was a slight amendment on March 15, 1928—covers the manner in which the patent applications shall be handled by the parties on future patents. Now, as amended in 1928—

The COURT. That is not in evidence yet.

Mr. DIXON. Well, we wanted the whole contract in, your Honor. And again I say if it develops, we want you to have the full contract, and I assumed that it was, I am frank to say.

The COURT. Have you offered more than Exhibit A in evidence?

Mr. DIXON. No, your Honor. But Exhibit A as we intended to offer it was intended to be complete which included the amendments.

The COURT. Have you a separate exhibit number for identification on it?

264 Mr. DIXON. No. It was attached.

The COURT. But it is all part of the same instrument?

Mr. DIXON. That is right.

The COURT. All right.

Mr. DIXON. And there again I am not certain whether we have—

Mr. WEBSTER. Where does that amendment appear?

Mr. WHITNEY. It is not here.

Mr. DIXON. We will indicate that it is not particularly material—

The COURT. For the present, since you are talking from an exhibit in evidence I would like you to limit yourself to the exhibit in evidence.

Mr. DIXON. I will do so, your Honor.

The COURT. Very well.

Mr. DIXON. We will therefore proceed to paragraph 6 of the contract. In this paragraph both parties agreed not to question the validity of any patents secured by either party, and there is also in this paragraph the royalty provision which provided for royalties which were to be paid to each of the parties under the contract. But also in paragraph 6 the Titan Company—that is, Titan A/S—appoints Titanium Pigment Company as the sole agent of its products in the Licensed Field for North
265 America and by any products to be sold that may be manufactured by Titan A/S in the territory of Titanium Pigment Company are to be sold at prices to be fixed by Titanium Pigment Company as the exclusive agent of Titan Company A/S. Titanium Pigment Company then

appoints Titan A/S as its exclusive agent to sell any products within the Licensed Field which may be manufactured by Titanium Pigment Company and sold anywhere in the exclusive territory of Titan Company A/S which, under the definition of the territories allocated to the two companies, would be any products manufactured or sold by Titanium Pigment Company outside of North America as defined in the contract, subject to the limitations that either party could sell in South America.

Now paragraph VII deals with the exchange of technical information. In other words, in addition to the exchange of present and future patents both parties agree to exchange what is understood in any business as "know-how" twice a year, and the parties are given the right to inspect and study and inquire into any of the plants operated by either party to the contract where work in the Licensed Field is being done.

Paragraph VIII requires each party to impose upon its employees and officers that may invent anything within the Licensed Field the obligation to assign that
266 invention to the company for whom the employee or officer works.

Paragraph X relates to the duration of the contract and the licenses granted under the contract were to run until December 31, 1936, but the contract as such—and of course the licenses granted thereunder—was to run after December 31, 1936, for successive periods of ten years each unless cancellation notices were served on the other party to the contract five years prior to the date at which the other party desired to cancel the contract. In other words, this contract would run now until 1952 under this provision.

The COURT. How do you get 1952?

Mr. Dixon. Well, it could not be cancelled now. You see, it has been automatically renewed for a ten-year period.

The COURT. 1946.

Mr. Dixon. Which would run until 1946, and then it cannot be cancelled thereafter until five years' notice is given of the cancellation, that is, the intention of each party to cancel it. In other words, it is an automatic clause.

The COURT. I don't read the clause that way. You can't cancel until five years before 1956.

Mr. Dixon. That is what I say. It would make
267 it run until 1951.

The COURT. As I see it, in 1946 if you haven't

given notice in 1941, you can't do anything about it—

Mr. DIXON. That is right.

The COURT (continuing). Until 1951, and then it would expire in 1956.

Mr. DIXON. Well, that is right, your Honor.

The COURT. In other words, the notice can only be given five years before the expiration of a ten-year period.

Mr. DIXON. That is correct.

Mr. WEBSTER. Notice not having been given five years before 1946 it can only expire in 1956.

The COURT. All right.

Mr. DIXON. We now come to paragraph XIV of the contract, which will frequently be referred to and become the subject of considerable discussion and evidence during the course of this trial.

Mr. WEBSTER. Presumably we can terminate the contract by agreement with ourselves before that period.

Mr. DIXON. I don't think that necessarily follows.

The COURT. No. We are reading the agreement as it reads, and the subsequent powers that the parties may have acquired is not the point that Mr. Dixon wants
268 to call my attention to. That may be something that Mr. Webster wants to call my attention to.

Mr. DIXON. Now, paragraph XIV of this contract was perhaps the one which gave it its most forceful sanction from the point of view of charges here in the complaint. I don't know as it is necessary to read it except—

The COURT. Point out the points that you think it makes.

Mr. DIXON. The first part of the paragraph before (a) limits the right of either party to the contract to make any license with any other person within its own territory even of its own patents.

Mr. WEBSTER. It says, "sublicense hereunder".

Mr. DIXON. That would be of course the license of its own patents. It could not give anyone else within its own territory any right to use its own patents. That is my point, your Honor.

Mr. WEBSTER. It does not say so.

The COURT. Yes. It says "provided that no party hereto shall grant any license under its own patents, or any sublicense hereunder, in the 'Licensed Field' except for the production of titanium or titanium compounds or for the utilization of such compounds"—I don't understand the language. "Provided" does not
269 seem to have a verb. I will read it again. Oh, I see. In other words, "sublicense or license under

its own patents must be limited to the production of titanium as distinguished from other forms of exploitation of the patents."

Mr. DIXON. The point, your Honor, that we wish to make under this paragraph is that in operation neither party could give a license even of its own patents unless the party, the licensee, whoever it might be, in its own territory had complied with the subsequent limitations expressed in paragraph (a) (1) (2) and so forth, without the consent of all the parties that were parties to the agreement.

The COURT. In other words, the conditions which are expressed in subdivision (a).

Mr. DIXON. That is correct, your Honor.

The COURT. There are eight conditions.

Mr. DIXON. Eight conditions which are very important.

Mr. WEBSTER. I still think we really ought to fall right back on the language that has been used here which is perhaps not used with all the care that might be desired in a lawsuit, but the language itself, not Mr. Dixon's characterization of it, because this one that he is talking about is not accurate—

270 The COURT. Why don't you wait until you comment on this contract? Don't you think that would be a more orderly way? He is now making an argument on the contract, and it is out of order in a sense, but I thought we agreed by unanimous consent to let him do that.

Mr. WEBSTER. I haven't wanted to interrupt at all, and I will try to refrain from doing it again.

The COURT. All right. Go ahead.

Mr. DIXON. In paragraph XIV the licensee must agree to all of the restrictions that are imposed upon the parties to the 1920 contract which, as we have already pointed out in the previous paragraphs, we think must confine their activities within the territory allocated to them, and that if by chance there should be any sales made outside of that territory they are made only under and through the other party to the contract as its exclusive agent. And, in addition to that, any licensee of either Titanium Pigment Company or of Titan A/S would have to agree to give to Titan Company A/S or Titanium Pigment Company the same privileges that they each enjoyed between themselves, namely, the right, the exclusive right to use such patents, processes or inventions that the licensee might develop while he was a licensee and that those would be made

available to the parties to the 1920 contract. In
270a other words, this was one of the provisions whereby
any inventions of a licensee of either of these two
companies or their successor companies would have made
available to them all of the benefits or all of the inventions
that any of the other parties to the contract might make—
a pooling agreement not only of the present but also of all
future patents as well that the parties might acquire while
the agreements were in effect.

271 In addition to that, the licensee of either of these
two parties would have to agree to furnish to the
other parties to the contract all technical information or
know-how relating to the industry, not only what they
had then, but there again whatever might be acquired in
the future. So that this provision of the contract pro-
vided that anyone who would subsequently become li-
censed under this agreement, or who would become a
party to it, would not only be obligated to do the things
which have been mentioned as being obligations imposed
on the parties to the contract, but they would also ob-
viously, in consideration of those obligations, get the bene-
fits that went along with it, which would be the royalty
free use of present patents that they then had—I mean the
parties to the 1920 contract—and anything that either
party or any other party that subscribed to the agreement
might have in the future.

That, then, was the pattern of the agreements which we
propose to show was followed in the subsequent agree-
ments that we will offer in evidence.

It has just been called to my attention that there is
another provision here that I had inadvertently over-
looked relating to the finished articles.

The COURT. That would be number 14?

Mr. DIXON. That is, I believe, in another pro-
272 vision of the contract.

Mr. WEBSTER. It is in the latter part of para-
graph VI under 2.

Mr. DIXON. Yes, that is right. I appreciate your help.
It is paragraph VI-2.

Mr. WEBSTER. The "N.B."

The COURT. I have it.

Mr. DIXON. This provides that if any finished articles
are sold within the territory of either party to the agree-
ment, that is, Titan A/S or Titanium Pigment Company,
and those sales of finished articles interfere with the
sales of pigments or similar finished articles by the party

in whose territory they are sold, that the other party to the agreement will do whatever possible to prevent such sales within the other party's territory. In other words, the customers who might buy a pigment from Titanium Pigment Company and use that pigment in any number of uses, of which we have described a few, if that became of sufficient importance in competition with the sales of the party to the agreement who had exclusive rights in those territories, he would notify the other party of such effect upon his business, and then the other party would endeavor to see that such sales or competition ceased.

That is all I wish to direct your Honor's attention to at the moment with reference to Exhibit A.

273 The COURT. Mr. Webster, do you want to draw my attention to any parts of Exhibit A?

Mr. WEBSTER. I would like to call your Honor's attention to the fact that as we read paragraph XIV, we do not understand that it imposes any necessity for consent with reference to sublicenses. It simply provides for sublicenses, if they are granted, that sublicensees must accept the restrictions or restraints, or whatever they are, contained in the contract as a whole, but there is no necessity for consent.

The COURT. Mr. Whitney.

Mr. WHITNEY. To my way of thinking, if this is the appropriate moment for me to comment, because we admitted the allegation that we entered into a certain contract in 1933, and that contract is annexed as an exhibit to the answer, so that I take it my purpose is to briefly point out to your Honor the contract between that agreement and this.

The COURT. That is a little early. You will have to wait until the 1933 agreement is in.

Mr. WHITNEY. It is already in evidence because it is pleaded and admitted in the answer.

The COURT. But it has not been admitted here. Has it been pleaded in the complaint?

274 Mr. WHITNEY. Yes, your Honor.

The COURT. And admitted in the answer?

Mr. WHITNEY. Yes, your Honor.

The COURT. Is the agreement pleaded in haec verba in the complaint?

Mr. WHITNEY. It is answered in haec verba.

The COURT. I understand that, but they may still create an issue as to whether or not that is the agreement between the parties.

Mr. WHITNEY. Any sequence suits me.

The COURT. I think it would be better if we waited until the 1933 agreement is offered.

Mr. WHITNEY. If he is going to offer it.

The COURT. I am assuming he is.

Mr. DIXON. Oh, yes.

Mr. WHITNEY. We have admitted it and therefore he does not have to offer it.

The COURT. As against you. That is good. However, I will make a note of what you have said.

Mr. DIXON. Now I wish to offer in evidence, your Honor, Plaintiff's Exhibit A-1.

The COURT. Mr. Whitney, is that the second one printed in your proof?

Mr. WHITNEY. Yes, your Honor, it is page 20, I believe.

275 The COURT. Then Plaintiff's Exhibit A-1 is received.

(Marked Plaintiff's Exhibit A-1 in evidence.)

Mr. DIXON. In this contract we direct your Honor's attention to our interpretation of it, to the effect that the National Lead Company, one of the defendants in this proceeding, and the Titanium Alloy Company, which had a stock interest in Titanium Pigment Company, agreed to respect the contract entered into between Titanium Pigment Company and Titan A/S as long as any exclusive licenses remain in force under the 1920 agreement.

The COURT. Exhibit A?

Mr. DIXON. That is right. Now in this agreement the Titanium Alloy Company further agreed not to contest the validity of any letters patent covered by the 1920 agreement nor to infringe any of the patents or afford any assistance to anyone in questioning or contesting the validity of said patents. They further agreed—talking now of National Lead and Titanium Alloy Company—to refrain from doing any act in derogation of the 1920 agreement and to promptly communicate to the Titanium Pigment Company the results of any experience gained or knowledge acquired within the Licensed Field.

276 They further agreed to promptly assign to Titanium Pigment Company throughout the world any letters patent, inventions or improvements within the Licensed Field which might be acquired by the defendant National Lead or Titanium Alloy Company, and further to require the officers and employees of National Lead and Titanium Alloy to agree to assign to them any inventions relating to the Licensed Field which any em-

ployees of National Lead or Titanium Alloy might secure; that is the rights under any such patents anywhere throughout the world.

Mr. WEBSTER. May I comment on that a moment?

The COURT. All right.

Mr. WEBSTER. I want to say this: I think heretofore the Titanium Alloy Manufacturing Company has not been identified.

The COURT. That is correct.

Mr. WEBSTER. The Titanium Alloy Manufacturing Company was a company that did the pioneer work in the invention of titanium, and they had a little factory up at Niagara Falls. They established a subsidiary called the Titanium Pigment Company—

The COURT. Is that the parent of the Titanium Pigment Company?

Mr. WEBSTER. That is the parent of the Titanium Pigment Company.

The COURT. Our TP.

277 Mr. WEBSTER. That is right, and the Alloy Manufacturing Company got into distress and sold a portion of its stock in the Titanium Pigment Company to the National Lead Company, and that explains why these three people were together in this contract.

The COURT. I assume that what you have now told us is going to be proved, if relevant. I will not take your statement as proof unless conceded.

Mr. WEBSTER. This is in the nature of the same sort of thing that Mr. Dixon is saying.

The COURT. But here is what I am driving at. I don't want you to sit down and assume that you have proved the facts that you have said if it becomes important to your case.

Mr. WEBSTER. I fully understand that nothing I say here is taken except as the representation of a member of the bar of the court as to what will appear, and your Honor may or may not attach significance to such representation.

The COURT. I may attach significance without being able to find a finding on any such statement.

Mr. WEBSTER. I fully appreciate the limitation.

The COURT. Unless counsel all agree it should be stipulated.

278 Mr. WHITNEY. Except it was your Honor's purpose, stated yesterday, of finishing before Christmas of 1945. If we can concede these things

I imagine we will save a tremendous amount of time, but I will concede that.

Mr. DIXON. I do not understand what the proposition is that is being made to the Government.

The COURT. The little statement of history made by Mr. Webster. You do not have to concede it.

Mr. DIXON. We will be glad to discuss these matters, your Honor, off the record.

The COURT. Is there anything further by way of comment, Mr. Whitney?

Mr. WHITNEY. No, thank you.

The COURT. All right, go ahead.

Mr. DIXON. We now wish to offer in evidence Plaintiff's Exhibit A-2, the same being the contract between Titanium Alloy Manufacturing Company and Titan Company A/S of the same date as the other two contracts previously introduced.

The COURT. Without objection it will be received; except of course Mr. Whitney's general objection.

Mr. WEBSTER. We take no objection to this. This is part of our view of the 1920 transaction.

The COURT. It will be received in evidence and marked Plaintiff's Exhibit A-2.

279 (Marked Plaintiff's Exhibit A-2 for identification.)

The COURT. Is there any comment, Mr. Dixon?

Mr. DIXON. Not particularly, your Honor, except to point out that in this contract the Titanium Manufacturing Company agreed to do all the things which the Titanium Pigment Company was obligated to do under the 1920 contract. And, on the other hand, not to do those things that Titanium Pigment Company was not to do under the 1920 contract.

Mr. WEBSTER. In other words, as I understand it, it simply agreed to respect its subsidiary's contract. Is that correct? (No response.)

The COURT. Mr. Whitney?

Mr. WHITNEY. No comment.

The COURT. All right.

Mr. DIXON. We now wish to offer in evidence, your Honor, Exhibit B. That is the agreement, your Honor, between Titan A/S and Societe Industrielle, March 3, 1927. That is the contract, if you want to refer to it, illustrated on chart No. 1.

The COURT. That is in the form of a letter dated March 3, 1927?

Mr. DIXON. Yes, your Honor.

Mr. WEBSTER. I have an objection to it.

The COURT. On what ground?

280 Mr. WEBSTER. The contract is objected to as incompetent, irrelevant and immaterial, and I would like, because of the points that I will make, being similar to the points made with reference to some of the other contracts, to be heard by your Honor on those points. It may take quite a few moments.

The COURT. I will be glad to hear you.

Mr. WEBSTER. The complaint appears to allege; and the trial memorandum submitted by the Government appears to show, and the opening of Mr. Dixon seems to clearly indicate, that it is the purpose, or one of the purposes of this action, to secure the cancellation of a number of these contracts, including this particular contract referred to as Government's Exhibit B for identification.

The COURT. They are not in court. If the parties are not here I cannot do it. I can summarize your argument as far as that is concerned.

Mr. WEBSTER. The point is that the interests of the Societe Industrielle would be materially and adversely affected; that the company is not here and that the Court cannot cancel the contract without that company present in court.

The COURT. Is TAS here?

Mr. WEBSTER. Well, as to TAS, I might have made the same point, except by reason of our peculiar
281 relationship to them it seemed somewhat fantastic to make the same argument; rather technical.

I am aware of the authorities dealing with the power of the Court in a Sherman Act case to cancel license arrangements which have been imposed upon people, according to findings of the court, that are unable to avoid such imposition, but I refer to a material contract under which mutual benefits are exchanged looking to the future. We think that the rule requiring the presence of the Societe should be applied.

282 Mr. WEBSTER. Now the next point I should like to make—

The COURT. Let me see if I can follow that point, I want to understand it, and I just let you put your point on the record. Granting that the Societe Industrielle is not here, TAS is here at least by proxy in some sort, is that right?

Mr. WEBSTER. TAS I should say was represented here.

The COURT. Regardless of what I may or may not be

able to do ultimately with respect to that contract, why isn't the contract relevant to the issues as evidence of the agreement made by TAS?

Mr. WEBSTER. Well, I think it could be considered by your Honor as relevant to the extension of the idea of the 1920 agreement with reference to a French company, and I don't make the point that it is irrelevant on that ground. I make the point simply that the contract is material, if it is material at all—and the contract can have no materiality with reference to the purpose of the Government to bring about a cancellation of the contract—

The COURT. That may be, but supposing it is material as evidence as to whether the 1920 contract should be cancelled?

Why wouldn't it be admissible on that theory?

283 Mr. WEBSTER. Well, if it is accepted as admissible for that purpose and for that purpose only, and if the Government now does not take the position that it is seeking to cancel this contract in this proceeding, I do not press the objection any further.

The COURT. But why should the Government be obliged to limit its offer? If the document is admissible, isn't it admissible generally? And the fact that I may not be able to give it a decree with respect to it—in other words, let me put it this way: Isn't there a distinction between the contract as one of the—well, a far-fetched use of the word—one of the demands of this contract and the contract as simply evidence of what the parties were doing namely, conspiring in violation of the statute? Am I not limited at this time to consider its function apart as evidence, whether this is one of the arrangements that need not be demolished?

Mr. WEBSTER. I do press upon your Honor—I think that I will make other points before we dispose of it first—

The COURT. I want to be sure I understood you.

Mr. WEBSTER. —because your Honor's comment is involved to some extent with the other points that I had in mind making.

The COURT. All right.

284 Mr. WEBSTER. The next point I intended to press upon your Honor is that of course an executory contract of this sort has been terminated by the war; that under the doctrine of the Hamburg-American case and other cases with which your Honor is familiar and to which I think your Honor recently referred in the case involving a motion to remand a proceeding to

the State Court, that it is perfectly clear that a contract of this sort involving executory obligations is terminated by the war.

The COURT. Wait a minute. I do not remember the case you are referring to, but did that involve an Austrian contract?

Mr. WEBSTER. Yes. It was a case involving a question of trading with the enemy.

The COURT. Who are the enemies here? France is not an enemy, neither is Norway. Is there enmity between France and Norway now? I don't know.

Mr. WEBSTER. The case of France is different from the case of course of the German contract. But the doctrine is one that applies to neutrals where any communication—if I may just refer a moment to this reference. Here is the reference I had in mind which makes this applicable to neutrals or Americans or anyone else engaged in communicating either with enemies or people in enemy-occupied territory, and the classic
285 reference is in 5 Wallace, which has been referred to many times and is a case cited in your Honor's opinion—

The COURT. I remember that.

Mr. WEBSTER. The William Bagaley. "Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are ipso facto dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress."

Now apart from that, I assume that the day we invaded North Africa with our troops a state of war existed between the United States and whatever shred of government might be said to exist at Vichy.

Now the third point is one which will develop I think in the course of the trial but which has reference to this discussion, and that is it does not appear yet—well, it does not appear at all—if it does not appear to what extent this contract has a material and direct effect on commerce of the United States. This contract relates primarily to trade in France and in the French Colonies and is largely material to that sort of commerce.

The COURT. In other words, it does not relate to American and foreign commerce?

Mr. WEBSTER. It does not relate directly and
286 materially, and until it appears that it does relate

to and affect directly and materially American and foreign commerce it is immaterial.

The COURT. Well, I don't have the contract so I can't discuss that with you intelligently. That is your point anyway. Those are all your three points?

Mr. WEBSTER. Those are the points?

The COURT. I am not impressed with the first point for the reasons I have already indicated. The second point conceivably may be of significance, but again when I distinguish between the contract as a contract and the instrument as evidence I don't think that the second point is as weighty as it might be. The third I want to hear from Mr. Dixon about because that is a question of relevance generally to the issues framed by the pleadings. Will it take you long, Mr. Dixon, to comment on that?

Mr. DIXON. I don't think so.

The COURT. If you want a minute, why, we will adjourn.

Mr. DIXON. I think I can cover it in a few words.

This contract, we expect to show, contains provisions as I suggested in the 1920 contract which obligated this licensee not to export into any other territory which would mean that it would be prevented from exporting 286a into the United States market. Therefore, to that extent it would be a factor in competition in either restraining or affecting commerce within the United States. And the purpose of these contracts was to prevent exports from one party into the other territory and, conversely, to prevent imports into the other party's territory and certainly that must affect commerce in the subject matter of the contract.

The COURT. Very well. We will recess for lunch and I will rule on the objection when we return.

(Recess to 2.15 p.m.)

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AFTERNOON SESSION

Mr. WEBSTER. If the Court please, if I may just say one more word about this question of the effect on foreign commerce. I feel that I stated my position very badly and I think I can summarize it in just a few words. The point is simply this, that the contract was a contract between a Norwegian and a French company in each of which we then, or subsequently, acquired a substantial amount of the stock: that is the National Lead Company acquired stock in Titan A/S and Titan, Inc. acquired

stock in Societe Industrielle. Furthermore, the rights of Titan A/S under the 1920 contract were subsequently taken over by Titan, Inc. Now here was a contract in which the Norwegian company, which had the 1920 contract, undertook to distribute a portion of its interest under the 1920 contract to a French company, and it did that. It was a case of carving out a piece of its interest and giving it to the French company. Now the French company is not shown, and I think will not be shown, to have ever manufactured any titanium pigments whatever. The company was never anything but a sales company. It secured its supplies of titanium pigments first, I believe, from the Norwegian company, and subsequently, for purposes of convenience, from the German company because of economies of manufacture. The

288 agreement related to sales by the Norwegian company within the former French Empire. Our view, and the point I am trying to make is simply this, that it is quite clear under the authorities, we believe, that an agreement must have a material and direct effect upon American commerce. I think that this contract was not calculated to have any such effect and therefore is immaterial on that ground, as well as on the two or three other grounds that I urged previously on which your Honor has ruled. Now I believe that is, in a nutshell, that which I was attempting, rather feebly and badly, to say this morning.

The Court. Do you want to add anything, Mr. Dixon? You do not have to unless you want to.

Mr. Dixon. I just want to add this, that we feel it is further competent as evidence of the general scheme and purpose that I have previously referred to as part of the conspiracy.

The Court. If I assumed that a contract between a Norwegian company and a French company relating to the French market is no concern of any American, nevertheless it seems to me that where you have an agreement to which an American company is a party and which does affect the foreign commerce of the United States and the interstate commerce of the United States that you may have an agreement between two foreign companies affecting commerce as between them which is nevertheless so designed so that it has an indirect
289 bearing upon the foreign commerce of the United States and upon the imports that may come into the United States, and upon the interstate commerce that

may be engaged in within the United States so as to become both relevant and material. But regardless of that substantive question it seems to me that where the complaint charges a worldwide conspiracy to control on a globular basis the commerce in a particular commodity that it is admissible to show the truth of that allegation, although it may be that some of the agreements which make up that complete whole would, taken in and of themselves, not afford a basis for civil or criminal remedies under the antitrust law. In other words, it becomes an element necessary to show the completeness of this worldwide scheme. In any event it seems to me that it is sufficiently relevant as evidence to be admissible.

I will overrule the objection and I will admit Plaintiff's Exhibit B.

(Plaintiff's Exhibit B for identification received in evidence.)

(Discussion off the record.)

The COURT. Have you any comment on Plaintiff's Exhibit B, Mr. Dixon, now that it is received in evidence?

Mr. DIXON. Yes, your Honor, I do have a comment on it. If you will bear with me for a moment there are two or three other exhibits in connection with this
290 Exhibit B contract that I am not certain whether the defendants, whom we subpoenaed to have the documents here, have them or not. If you will let me ascertain that?

The COURT. Certainly.

(Discussion off the record.)

Mr. DIXON. Well, in the meantime I will offer in evidence Exhibit B-3.

The COURT. Is there any objection?

Mr. WEBSTER. No, subject to the same objection that was made to the French contract, Exhibit B.

The COURT. Mr. Whitney?

Mr. WHITNEY. Only the continuing one, your Honor.

The COURT. All right. It will be received and marked B-3.

(Plaintiff's Exhibit B-3 for identification received in evidence.)

Mr. DIXON. We offer in evidence Plaintiff's Exhibit B-4 for identification to complete that picture.

Mr. WEBSTER. Same objection, if the Court please.

The COURT. Objection overruled.

(Plaintiff's Exhibit B-4 for identification received in

evidence.)

291 Mr. DIXON. I wish to refer to Exhibit B, referring briefly in passing to B-3 and B-4, as being in explanation of contract B, and an extension of the definition of the Licensed Field in this contract. Now this particular contract was dated on March 3, 1927, and the parties to this agreement are co-conspirators Titan Company A/S and Societe Industrielle du Titane, which was the French company to which was allocated the territory of France and its colonies.

The COURT. Well, now, B-4, isn't that between the same parties? And B-3 does not seem to be between the same parties. I don't understand how they modified and extended it. You will have to explain that.

Mr. DIXON. Your Honor, B-3 was correspondence explaining this contract and its execution, as will be indicated, or as is indicated by this exhibit.

The COURT. Meaning B—

Mr. DIXON. B-3.

The COURT. Let me read it. All right. You had better explain that to me.

Mr. DIXON. In 1922, as appears from this exhibit, Titan Company A/S had made an agreement with another French company entitled Societe Minerale Franco Brazilien, regarding the sale of titanium in France, at which time it was contemplated that a French company be

292 formed to carry on the titanium business in the French territory and that that company was to be licensed by Titan Company A/S. This company, that is, Societe Industrielle, the other party to this contract, Exhibit B, was organized in 1925 as appears from Exhibit B-3, and the so-called formal license contract which was provided for in the previous arrangement between Titan Company A/S and Franco Bresilienne was this contract Exhibit B which we now propose to discuss.

The COURT. That was made in 1927.

Mr. DIXON. That is right. Which was made and dated March 3, 1927. Now in this contract there is a general expression of intention with regard to the carrying on of the titanium pigment business in the French territory based upon the 1920 agreement. The Licensed Field definition is in substance essentially the same as that in the 1920 contract.

The COURT. It is stronger than that. It says "The definitions shall be the definitions of the 1920 agreement."

Mr. DIXON. That is right.

The COURT: It is more than substantial.

Mr. DIXON. It is the actual incorporation into this contract of the identical provisions.

293 The territory of Titan Company, A/S is then defined as including all other territory not included within the definition of France as described in the definition of France in contract Exhibit B. In other words, this was the beginning of the carving out of the rest of the world which had been allocated to Titan A/S in the 1920 agreement between Titanium Pigment Company and Titan Company A/S, where your Honor will recall that the Titanium Pigment Company was granted all of North America as an exclusive market and all of the rest of the world except South America was made exclusive to Titan A/S, with South America being open territory for both companies to that 1920 agreement. So out of that territory which had been allocated to Titan Company, A/S, this is the first division of that territory.

Now, Article 2 of this agreement, Exhibit B, then refers to the granting of licenses on patents, methods and experience by Titan A/S not only that which it then possessed but which it would at any time thereafter possess or acquire while these contracts were in effect. The license given to this French Company, Societe Industrielle, by Titan A/S was exclusive for the territory allocated to this French company, and to that extent it is following the same pattern with respect to the exclusive allocation of territory as was made in the 1920 agreement.

294 Then we see the further restrictions on the right to sell products within or outside of the exclusive territory allocated to the licensee or the French companies, we will call them, in this contract.

In Article III of the contract there is again the granting of all patents, methods and experience which the French company will possess or acquire within the Licensed Field back to Titan A/S while the agreement is in effect.

Now there is some reference here in Articles II and III to the right of customers of Societe Industrielle to sell products—I mean, those products outside the Licensed territory into the others territory, but that is qualified in the contract and both parties agree to impose the obligation on the customers not to sell outside of the territory. In other words, in the first part, as your Honor can see, there were some rights granted and then they were generally restricted. And if any sales were to be made outside of the licensed territory, the sale must be made

through Titan A/S as exclusive agent of Societe Industrielle and such sales can only be made with the consent of Titan A/S as such agent.

Now there is a little broader application of this principle in this contract because anticipating the expansion of it, Societe Industrielle may be required to have
295 such sales made through such persons or corporation as Titan A/S may determine outside of the territories of Societe Industrielle. Here also we see the provision with regard to the agent fixing the sales price, in other words, the price at which any such sales can be made, solely within the discretion of the agent in his territory. Also in this contract there appears the provisions as I suggested, seeing or looking to the preventing of customers purchasing any titanium pigment from the parties, from competing with the other party to the agreement in the others territory. And the parties agree that if that happens that the party in whose territory that condition arises must take the necessary steps to prevent the customer from continuing such competition.

Mr. WEBSTER. Would you mind referring to the paragraph numbers so that we can follow it?

Mr. DIXON. I am down now, to paragraph 5. This Article V provides that upon applying for patent applications within the Licensed Field, each party must send a copy thereof to the other party within two months from the date of the filing, and if the other party desires applications to be filed in his particular territory on such patent applications, the other party or the inventor is obligated
296 to take such steps as may be necessary to see that such applications are filed in the other party's territory.

Now under Article VI the licenses are granted and accepted and any sublicenses that are granted are conditioned upon the licensees agreeing not to oppose any patent that Societe or any of its sublicensees shall secure at any time during the term of the agreement. And the licensee shall assume the previous obligations I have referred to and those which are found in Article IV concerning selling and designation of the other party to this contract as the agent where such sales may be made in the other person's territory by customers or licensees of Societe Industrielle.

297 The COURT. What is a retro-license? What does retro-licensing mean? Subdivision (g) of the section you are reading; Article VI!

Mr. DIXON. I do not know just what that provision does actually contemplate, except that with the background we have of this contract this would seem to refer to the license which was originally provided should be given this company under the contract between Titan A/S and Societe Bresilienne in 1922.

The COURT. I do not think it means that. I should guess that it means in some way the Society becomes a licensee of its own patent for some process; licenses the other party exclusively and then they get a relicense back. I am not sure.

Mr. DIXON. I confess, your Honor, I do not know exactly what that does mean.

The COURT. All right. Is there anything else?

Mr. DIXON. But in Article VI, as I suggested, any sub-licensees are required to assume these obligations and all the obligations of Article XIV of the 1920 agreement.

Now in Article VII each party agrees to exchange the technical information or know-how that we have previously referred to within the Licensed Field and the usual

provision is there in this article for inspections
298 of plants and such other means as are necessary
to carry it out.

Then follows Article VIII with regard to requiring employees of any company to assign their patents, which we have seen before.

Article IX each party agrees, wherever possible, to make the other party a beneficiary when acquiring any patent rights within the Licensed Field.

And Article X is the duration provision of the contract that the exclusive licenses are to remain in force until December 31, 1941 and shall continue thereafter for 10-year periods unless renounced by either party by written notice addressed to the other party at least six years before December 31, 1941.

The COURT. That gives the principal a one-year more period to make up his mind whether he is going to act on the other situation. I don't know whether it actually works out that way.

Mr. DIXON. I was going to point out that difference your Honor. The other contained a five-year provision.

Article XI provides that the French company assumes the same obligations toward the American company, Titanium Pigment, with reference to the South American territory as it does toward the Titanium Pigment Company

in North America in the event Titanium Pigment Company decides to appropriate or use South America as its exclusive territory; in other words, looking to that as a possibility.

There are other provisions there, XII and XIII, providing merely the sanctioning or tightening clauses in the contract, that you could not get out of it by licensing and creating subsidiaries, and so forth, and then follows Article XIV, being the identical number in this contract as in the 1920 agreement in which the French company is prohibited from granting any license under its patents at its disposal outside of France where such licenses do not make the licensee an associated company within the terms of Article I, paragraph (g) of this contract. And under that definition an associated company is one which agrees to comply with the provisions of the 1920 agreement, and any licenses granted in its own territory by this French company are subject to that restriction; that the licensee must agree to comply with the restrictions of the 1920 agreement.

It has been directed to my attention that in this Article XIV the term "retro-licensee" is also used and that it might possibly mean, as your Honor has indicated, a sub-licensee of a licensee of your own patents back over to the other parties.

That is all the comment I care to make on Exhibit B, your Honor.

The COURT. It does not seem to have been signed by but one party. I mean it is a letter from Titan A/S to SIT, but I do not see SIT's exhibit.

Mr. DIXON. We have subpoenaed Exhibit B-1 itself for just that thing. We do not have it here.

Mr. REA. Mr. Dixon, I hand you B-1.

Mr. DIXON. We now wish to offer in evidence Plaintiff's Exhibit B-1 for identification.

The COURT. I do not understand that at all. It is a letter dated 1927 and says "The receipt of your letter of March 3, 1939." That is crystal-gazing with a vengeance.

Mr. DIXON. That should be March 3, 1927. I think that must be a typographical error.

The COURT. Have I the consent of everybody to change 1939 to 1927?

Mr. REA. Mr. Dixon, I give you the original French. There must have been a mistake.

Mr. DIXON. This says 1927, your Honor.

The COURT. Then by unanimous consent I strike out the

figures 1939° and substitute 1927. All right. Plaintiff's Exhibit B-1 is received.

(Plaintiff's Exhibit B-1 for identification received in evidence.)

301 Mr. DIXON. I now wish to offer in evidence Plaintiff's Exhibit C.

Mr. WHITNEY. I was waiting for Mr. Webster on Exhibit B.

Mr. WEBSTER. I have nothing to say about B at this time, your Honor.

Mr. WHITNEY. If your Honor please, I am going to refer only to B-4. B-4 is the letter from Titan Company, Inc. by Jebesen to Societe Industrielle du Titane dated February 17, 1939. I observe on page 2 of it, and I would like to call your Honor's attention to it, the second paragraph reads as follows:

"The expression 'associated companies' as used above is meant to refer to any company which has or will acquire a license of the character described in Article XIV, paragraph (a) of the agreement of 1920, and further the firm E. I. du Pont" (misspelled with an e on the end) "de Nemours and Company, Wilmington, Delaware, U.S.A."

I am instructed, though I have never seen it before, and I call it to your Honor's attention, that it says in so many words that du Pont was not a company which had acquired a license of the character described in Article XIV, paragraph (a). Someone, Dr. Jebesen is very kindly, although perhaps after your Honor is through

302 with this case we may conclude that his kindness was misplaced, told someone in Paris that we are going to be given a chair at this table of associated companies. We never knew it and we never occupied it. But at all events it is conclusive evidence introduced by the Government that we are not a party to the article which Mr. Dixon has repeatedly told us, including this morning, was the most important article in the whole case. He said constantly that this agreement Exhibit A of 1920 was the prototype of all the agreements, and that Article XIV was the key clause in that, and I am grateful to him for introducing evidence from the same source that we were not a party thereto and had none of the benefits thereof, which, I think, disposes of his case.

The COURT. As long as there is no motion pending.

Mr. WHITNEY. No. I won't make a motion.

The COURT. I will just let that lie for the time being. There is no comment on Mr. Webster's part, is there?

Mr. WEBSTER. No, your Honor.

The COURT. Now I understand that Exhibit C is offered?

Mr. DIXON. That is right, your Honor.

The COURT. Is there any objection?

Mr. WEBSTER. I renew as to Exhibit C for 303 identification the points made this morning generally with reference to the French agreement B, namely, that the parties are not present; that the agreement was terminated by the war; and that it had no direct nor material effect on United States commerce, and I shall emphasize the latter if and when my friends offer some of the exhibits that are ancillary to this.

The COURT. Is the document now offered, Exhibit C, a document that is printed?

Mr. WHITNEY. I might help you and ourselves and Mr. Dixon, and anyone else who is holding a printed contract, to just refer to page 46 and we have just worked out here following the notes at the top; which I am told appear at the top of the agreement Exhibit B, and the printer has just printed them in but they really turned out to be a convenient little index, and if your Honor wants to make a note, or anyone else, opposite those, No. 1 is C at page 46. No. 2 is C-1 and at page 51.

The COURT. I don't know what you are referring to.

Mr. WHITNEY. At the top of page 46.

The COURT. I see a little schedule 1 to 8.

Mr. WHITNEY. And I was going to run through from 1 to 8 and give you the pages of each.

The COURT. In the printed exhibit?

Mr. WHITNEY. Yes.

304 The COURT. Go ahead.

Mr. WHITNEY. No. 1 is Exhibit C on page 46.

Mr. WEBSTER. May I ask Mr. Dixon if this little schedule that Mr. Whitney is referring to is not something that was attached by him to the exhibit for convenience?

Mr. DIXON. It was not attached by the Government.

The COURT. It is a little memorandum.

Mr. DIXON. It can be disregarded.

Mr. WHITNEY. I think you will find it has a little index that will help. On page 46 is Exhibit C and we observe that:

No. 1 is Exhibit C at page 46.

No. 2 is Exhibit C-1 at page 51.

No. 3 is Exhibit C-2 at page 54.

No. 4 is Exhibit C-3 at page 58.

No. 5 is Exhibit C-4 at page 76.

No. 6 is Exhibit C-5 at page 78.

No. 7 is Exhibit C-6 at page 80.

No. 8 is Exhibit C-7 at page 82.

Mr. WEBSTER. Your Honor, we have no objection to the index as given by Mr. Whitney, but I would like to point out that on the original exhibit the little slip of paper which is attached to it and from which that index is taken is something that has been attached apparently by the Antitrust Division.

Mr. DIXON. No. That is not true, your Honor. I want to make clear that was on the document and to our judgment it was as much confusing at times as it was clarifying.

The COURT. Is it suggested it was part of the original agreement?

Mr. DIXON. No. It can be disregarded as part of the agreement.

The COURT. I will disregard that as part of the exhibit and simply use it for the purposes Mr. Whitney has just indicated.

Is there any objection to Exhibit C other than what I have just heard from Mr. Webster?

Mr. WHITNEY. And the continuing objection.

The COURT. The objection is overruled and Exhibit C is received in evidence.

(Plaintiff's Exhibit C for identification received in evidence.)

Mr. DIXON. Perhaps at this time I should, and will therefore, offer in evidence each of these other exhibits which are part of the so-called German contracts.

The COURT. Exhibit C I must know a little more about. Who are the parties?

Mr. DIXON. That was the agreement and understanding between Titan Company A/S and I. G. Farbenindustrie October 3 and 20, 1927.

The COURT. All right.

Mr. DIXON. I therefore wish to offer in evidence at this time Plaintiff's Exhibit C-1.

Mr. WEBSTER. That is subject to the same objection as C itself.

Mr. DIXON. Your Honor, I will be glad to identify this for your assistance. This is the partnership agreement between Titan Company A/S and I. G. Farbenindustrie Company dated June 24 and October 20, 1927.

The COURT. The objections are of the same character. I take it?

Mr. WEBSTER. That is right.

Mr. WHITNEY. Yes.

The COURT. The objections are overruled and it is received in evidence.

(Plaintiff's Exhibit C-1 for identification received in evidence.)

Mr. DIXON. We now offer in evidence Plaintiff's Exhibit C-2, which is the license agreement between I. G. Farbenindustrie and Titangesellschaft, signed October 3, 1927.

The COURT. The same objections?

Mr. WEBSTER. In addition to the other objections
307 I submit that this exhibit is objectionable because on its face it is an agreement between I. G. and T.G.

The COURT. Two German companies?

Mr. WEBSTER. Two German companies, and relates to the license given by one German company to another German company for use in Germany and is therefore immaterial and irrelevant.

The COURT. The objection is overruled.

(Plaintiff's Exhibit C-2 for identification received in evidence.)

The COURT. I take it, as I must repeat occasionally just to remind myself, that no one questions the authenticity of the documents or that the contracts were executed. These are not just pieces of paper!

Mr. WHITNEY. That is right.

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit C-3, the same being license agreement between Tifan Company A/S and T.G. dated October 3 and 20, 1927.

The COURT. The same objections?

Mr. WEBSTER. The same objections as to the previous agreements in this group.

The COURT. The objections are overruled.

Mr. WHITNEY. Your Honor's precaution in saying what you were assuming throughout is correct, but I hope you will permit me to say the reason of my conceding authenticity is because the Government and
307a Mr. Webster tell me that is authentic.

The COURT. I understand, but you are not putting that in issue.

Mr. WHITNEY. That is right.

(Plaintiff's Exhibit C-3 for identification received in evidence.)

308 Mr. DIXON. I now offer in evidence Exhibit C-4, the same being an agreement between TG and IG, regarding the transmission of such things as services, water and gas and so on, for this new company, dated October 3, 1927.

Mr. WEBSTER. I think this is about as far north as the Government can go on making relevant agreements of this type having to do with the renting of services, of gas and so forth, and space and transportation. And I make the same objection as I made previously.

The COURT. As long as it is no further north than the Government can go.

Mr. WEBSTER. I say about as far north as they could go.

Mr. DIXON. Your Honor, off the record.

(Colloquy off the record.)

The COURT. Objection overruled. Exhibit C-4 is received in evidence.

(Plaintiff's Exhibit C-4 for identification received in evidence.)

Mr. DIXON. I now offer in evidence Exhibit C-5, the same being an agreement between TG and IG, dated October 3, 1927.

The COURT. The same objections, I take it.

Mr. WEBSTER. The same objections.

309 The COURT. I suppose, although these are called separate agreements, they are merely paragraphs of a large agreement. They seem to have been all made on the same day and the same parties and relate to the subdivisions of the same subject matter. Isn't that true?

Mr. DIXON. That is correct. I might add an explanation—I was going to make it as soon as we have these documents in evidence—that they all relate to the carrying out of the principal agreement entered into which is Exhibit C.

The COURT. Exhibit C-5 is received in evidence.

(Plaintiff's Exhibit C-5 for identification received in evidence.)

Mr. DIXON. We wish to offer in evidence Plaintiff's Exhibit C-6, the same being an agreement between TG and IG, dated October 3, 1927.

Mr. WEBSTER. I make this comment by way of glass on my previous objection, and that is that here was a case where a manufacturing company, Titangesellschaft, was making use of the great sales facilities of what it assumed the sales facilities of its parent, and it is a little

difficult for me to apprehend the connection of the National Lead Company with that.

The COURT. The atmosphere is getting more rarified, but I suppose there is still some virus of antitrust floating around in it, according to the Government.
310 Objection overruled.

(Plaintiff's Exhibit C-6 for identification received in evidence.)

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit C-7, the same being an agreement between TG and Titan A/S, dated October 3 and 20, 1927.

Mr. WEBSTER. That is an agreement by which the Titan Company up to Norway have found an outlet for some of its Norwegian ore in Germany.

The COURT. You mean that it has no relationship to titanium?

Mr. WEBSTER. It is connected with titanium, titanium ilmenite, the element of titanium, I suppose.

The COURT. This ore is ilmenite?

Mr. WEBSTER. This ore is ilmenite, mined in Norway and sold under this agreement to TG.

The COURT. Well, that is close enough, if it is ilmenite. I thought it might be some unrelated ore. Objection overruled.

(Plaintiff's Exhibit C-7 for identification received in evidence.)

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit C-8, the same being a contract between TG and Titan A/S, dated October 3 and 20, 1927.

311 Mr. WEBSTER. The same objections. I point out that this is an agreement under which the Titan Company was able to buy, that is, Titan A/S was able to buy fifty per cent of the capacity of TG at cost, and I may say now that that proved to be an important right to the Norwegian Company.

The COURT. It will be received.

(Plaintiff's Exhibit C-8 for identification received in evidence.)

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit C-9. This is an extension of the Licensed Field, your Honor.

The COURT. Who are the parties?

Mr. DIXON. The parties are TG, supposed to be TG, and Titan Company, Inc. For the purpose of the record I think we can state to the Court that this exhibit was executed in the early part of 1939.

The COURT. Is that generally conceded?

Mr. WEBSTER. Well, we will accept that subject to correction. I understand there may be some—

The COURT. Early 1939 is stipulated, subject to correction. Now you notice, Mr. Whitney, that page 88 refers to you.

Mr. WHITNEY. Yes, sir. That is why I suggested to the gentlemen that it could not have been 1927, it must have been a later date. That is that same point, of course. We know from other evidence that they had an idea they would have liked us in, and they used to try to keep the place open for us, but we never came.

The COURT. Exhibit C-9 is received in evidence.

(Plaintiff's Exhibit C-9 for identification received in evidence.)

The COURT. Are you through now with your C's?

Mr. DIXON. I would like now to make a few comments about this.

The COURT. All right.

Mr. DIXON. Exhibit C is the agreement and understanding between the co-conspirator Titan A/S and the I. G. Farbenindustrie Company, one of the other co-conspirators, and is dated October 3 and 20, 1927. On the chart No. 1 this agreement is represented by the 1927 TG box, and the territory and so forth allocated is shown on that chart.

Now this was an agreement between the co-conspirator Titan A/S and the I. G. Farbenindustrie Company of Germany, whereby they agreed to arrange for cooperation in the field of manufacture and sale of titanium pigments and compounds. The definition of the Licensed Field is substantially the same in this agreement as in the 1920 agreement, and in the 1927 agreement to Societe Industrielle with very slight modifications. In this agreement the co-conspirators agree to form a company which shall be called Titangesellschaft, which is the TG co-conspirator named in the complaint, which is to be operated by four managers, two of them to be selected by IG and two by Titan Company A/S. The parties then agree to have any titanium pigments manufactured in the territories described in the contract, which are those referred to on chart No. 1, manufactured exclusively by this new company, and to acquire their requirements for titanium pigments from this new company to be formed as previously stated. This is to be accomplished by carrying out the terms of contract B, which is the next exhibit, C-1, which I will discuss in a moment.

Then follow the mechanics of it whereby these things are to be accomplished: IG is to enter into a contract wherein it will grant to this new company an exclusive license under all patents then owned by IG or thereafter acquired by IG, which relate in any way to the Licensed Field. That was done in contract C-2, our Exhibit C-2. The Titan Company is to enter into a contract, our Exhibit C-3, that is with this new company TG, whereby it is to transfer to this new company all of its patents and processes in the Licensed Field within the territory, and to further obligate itself to disclose to this new company all of its technical information then at its disposal or which might thereafter be acquired.

314 Then follows the provisions, incidental perhaps to the main purposes of the contract, that IG and TG are to make a contract, Exhibit C-4, renting a factory belonging to this new company and placing at its disposal the necessary things to get it started, such as water, steam, electricity and so forth.

And IG and TG are to enter into a contract, our Exhibit C-5, wherein IG is to be obligated to supply this new company with all the products necessary to carry out its arrangement that was theretofore made and in turn this new company is to supply all the obligations of IG. And IG and TG are further to enter into a contract, our Exhibit C-6, appointing IG the exclusive sales agent for the total production of this new company, except such portions thereof as may be supplied to Titan Company A/S. And then Titan A/S and the new company are to enter into a contract, our Exhibit C-7, whereby Titan A/S is to supply this new company with all the ilmenite that it might require in the manufacture of titanium pigment.

Your Honor will recall that previously we had referred to Titan A/S as having some properties in Norway containing ilmenite. And Titan and TG, this new company, are to enter into another contract, our Exhibit—

The Court: You say "also to." This agreement says they did.

315 Mr. Dixon. Yes. Well, this is what they were to do.

The Court. Call it contemporaneous.

Mr. Dixon? That is correct. It was a reduction of the understanding and this is how it was to be carried out. (Continuing.) Obligating the new company to supply all the requirements of Titan A/S at prices to be fixed in this particular contract. In other words, a price provi-

sion. And any processes intended by this new company are to be placed at the disposal of Titan Company A/S or any of its sublicensees for use in the territory of Titan A/S, and IG, the other co-conspirator connected with these contracts, is obligated to respect the territory of Titan A/S and any of the sublicensees of Titan A/S, and to refrain from producing or selling titanium pigments except through the medium of this new company. In other words this contract directly between Titan A/S and I. G. Farbenindustrie obligated the German chemical concern that we have described from operating in the titanium business in any way except through this new company.

Now the first C-1 exhibit is the partnership agreement between Titan A/S and the I. G. Farbenindustrie dated June 24 and October 20, setting up the details of the incorporation, the amount of capital, and providing for the management of this new company; and further providing that the company cannot be dissolved before December 31, 1957.

The COURT. Let me ask you this. The partnership formed under that name of Titangesellschaft m.b.h., is that the Titangesellschaft that we are talking about?

Mr. DIXON. That is the one, your Honor.

The COURT. So that is really a limited partnership, not a corporation.

Mr. DIXON. That is the form, as I understand it, that they use abroad. This is a partnership agreement. The facts are that Titan A/S owned 50 per cent of the stock in the new company.

The COURT. It really was a corporation?

Mr. DIXON. Yes.

Mr. WEBSTER. No.

The COURT. I thought it was a limited partnership.

Mr. WEBSTER. There wasn't any stock; but we didn't deny the charge that there was stock in the complaint because we did not think it was material.

The COURT. For practical purposes it is the same thing.

Mr. WEBSTER. That is right.

The COURT. In form it took the shape of a limited partnership.

317 Mr. WHITNEY. Your Honor, could I say off the record—

(Colloquy off the record.)

The COURT. We will take a short recess.

(Short recess.)

Mr. DIXON. I just wanted to add before I leave Exhibit C-1, that this contract also provided that until the shareholders' meeting is held or thereafter, Mr. McCarty and Dr. Jebson, whose names your Honor will have occasion to become familiar with in some of the subsequent documents, are to be appointed as two of the general managers of this company until further managers are provided for.

Now Exhibit C-2 is the license agreement between—

Mr. WEBSTER. I would like to point out in connection with additional managers or general managers, that I take that to mean in the European sense directors of the company and not managers in the usual sense.

Mr. DIXON. Exhibit C-2 is the license agreement also labelled Contract C under the series of contracts mentioned, and is between IG and this new company, TG, and is dated October 3, 1927. This is important from the point of view of showing again the general nature of the contracts and the license agreements, this one being from the I. G. Farben Company, as I suggested, to this new company TG. And in this contract IG grants to TG

318 exclusive licenses under all patents, methods and experiences in the Licensed Field theretofore defined in contract A or our Exhibit C. IG then agrees to send to TG a copy of any patent applications in the Licensed Field within a four-months period after they have been filed by IG, and TG agrees to thereafter inform IG as to whether further applications are desired in the other countries which it is obligated to pass on the value of those patents to under its contract with Titan A/S.

TG is to pay any expenses of maintaining or defending or acquiring any letters patent which IG secures in the future relating to the Licensed Field unless this new company TG surrenders its exclusive licenses. If it does it is still to be entitled to a non-exclusive license even under those circumstances.

Then follows the other provision, obligating officers of the IG to see that any patents that may be developed by the inventors, I mean any employees or officers of IG, are made available to this new company. And then they further agree, that is, TG and any exclusive licensee, under IG's patents, are to have the right to defend them but the new company is to be obligated never to question the validity of any of these patents nor to

afford any assistance to any contestant or anyone who might question their validity, and IG assumes a similar obligation on any of TG's patents.

IG then obligates itself in granting any license under any processes involving or using titanium compounds to impose upon its licensees the obligation to secure all of its requirements of titanium compounds from TG or TG's licensees. And then IG agrees that it will do nothing against the interest of this new company and any of the companies which may be associated with it in the titanium pigment field. In other words, it is going to operate in the titanium pigment business only through this new company.

Now our Exhibit C-3 is the license agreement from Titan A/S to this new company, and is dated October 3 and 20, 1927, and covers the relations between Titan A/S and this new German company, TG, in exploiting processes for the production of titanium compounds. This license follows in substance previous licenses and I refer to them briefly.

The definition of Licensed Field is substantially the same as in the other agreement. Titan A/S obligates itself to grant to TG for use in TG's territory all of the patents that it then owns or may thereafter acquire, together with methods and experience, I mean the know-how again, which it might thereafter have at its disposal.

320 The customers of TG, but not TG itself, are given the right to sell finished articles, which we have referred to before outside of TG's territory, subject however to the conditions of the 1920 agreement which we have previously referred to; in other words, finished articles manufactured by customers and using titanium pigment could not be exported into, say, the United States under this provision. If there were and it affected the business of the Titanium Pigment Company in the United States under this provision of the contract, this German company would be obligated to take steps to prevent any further export of those products by the person to whom the pigment had been sold.

Then the exclusive license provisions that I have referred to. The obligations are then assumed by both Titan A/S and TG not to sell directly or indirectly in each other's territory, and, as I previously suggested, the companies further agreed to impose this obligation on

their customers. That is clearly provided for in the agreement.

The Titanium Pigment Company is appointed the exclusive agent of the parties in North America, and in South America in the event this becomes the territory of the Titanium Pigment Company under the 1920 agreement. However, no sales are to be made even in 321 the territory of the Titanium Pigment Company without the consent and approval of Titan A/S. In other words, if there were such sales even operative under the agency provision they still cannot be made unless Titan A/S agrees that they may be made in the United States.

Then this new German Company agrees, on the request of Titan A/S, to appoint as its exclusive agent any allied company which is the exclusive licensee of Titan A/S in any part of Titan's territory. The agent there, as is previously provided in the other agreements, is to fix the prices at which these products in the titanium field may be sold.

Mr. WEBSTER. I find it difficult to follow that. Which paragraph?

The COURT. He has been moving along from paragraph to paragraph. Occasionally he skips one. But go ahead. If you can now give him a pointer, he, not being familiar with it, can follow it.

It is page 64, the second paragraph.

Mr. WEBSTER. That is what he is referring to?

The COURT. I assume so.

Mr. WEBSTER. I have it now.

Mr. DIXON. And here again it becomes the territory of Titan A/S, which has everything that is not given to the new German company, and here again if the 322 sales in the other's territory in any way interferes with the sales of the allied companies outside of TG's territory, the TG agrees to take such steps as are necessary to see that those sales by their customers shall cease.

Then we have the procedural matter relating to the manner and method of exchanging patent applications, which we have discussed before, and how it shall be done and who is to make the payments. And here Titan A/S has the right to make such payments in the name of this German company on any North American patents and to charge the German company for such payments even though they are taken out in the United States, for example.

The exclusive licenses granted in this contract are again conditioned on the agreement of the German company and Titan A/S never to contest the validity of any patents under which they may be licensed and to not give aid to anyone in contesting the validity of such patents; and all royalties payable to Titan are to cease on December 31, 1936, and the new German company then assumes all obligations of Article XIV, subsection (a) which is the one we have previously discussed of the 1920 agreement, exclusive of subsections 1 and 3 which are not material to consideration of the contract from our point of view.

323 Then the know-how provision is inserted in the contract providing for the exchange of technical information, and then there is a provision in the event the American company, Titanium Pigment, shall acquire South America as its exclusive territory, which had been previously declared as open territory, that then this German company agrees to enter into the same obligations as to South America as are imposed upon it for North America. Then of course the new German company is not to get any licenses outside of its territory without making the licensee an allied company.

Now Exhibit C-4 is really unimportant. It just provides what IG shall do, as I suggested, for the new German company to get them started in accordance with Exhibit C.

Exhibit C-5, however, does require IG to take all of its requirements of titanium pigment from this German company. That agreement, as previously stated, was signed October 3, 1927, along with these others. And this is to be done on the cost-plus-10-per-cent basis.

Exhibit C-6 then appoints IG as the exclusive sales agent for TG in TG's territory with the prices, however, to be fixed by TG.

Exhibit C-7 obligates the new Germany company to take its ore supply from Titan A/S.

324 Exhibit C-8 merely provides that Titan A/S may purchase products from TG on a certain basis so that the output of this new company is to go to Titan A/S at least 50 per cent of it, at cost.

Then follows Exhibit C-9, which is the license for the extender which we previously referred to. In other words, the obligation was imposed on the German company to supply 50 per cent of its output to the Titan A/S at cost on a cost basis provided they wanted it.

Now that brought about the division of these territories

set forth specifically on chart 3, which is the territory allocated to this new company under this agreement, so that we start out with all the rest of the world having been allocated to Titan A/S under the 1920 agreement and we now find that a portion of it has been allocated to Société Industrielle and a substantial portion of the remainder, exclusive of the British Empire territory, has been allocated in turn to this new company. I wish to point out in passing that this exclusive territory allocated to the new German company included practically all of Asia, that is Japan and China, and all of southern Europe where they had exclusive rights, with non-exclusive rights in South America, along with all the other licensees or parties to the agreement.

Mr. WEBSTER. I have no comment now, your Honor.

325 Mr. DIXON. We now wish to offer in evidence Plaintiff's Exhibit D for identification, the same being an agreement dated March 23, 1929, between Titan Company, Inc. and Titan Company A/S.

Mr. WEBSTER. No objection, your Honor, by National Lead.

The COURT. The same objection from Mr. Whitney?

Mr. WHITNEY. Yes.

The COURT. Objections overruled. Plaintiff's Exhibit D received in evidence.

(Plaintiff's Exhibit D for identification received in evidence.)

Mr. DIXON. I now wish to offer Plaintiff's Exhibit D-1 in evidence.

Mr. WHITNEY. If your Honor please, D-1 and D-2 went to the printer's this morning and they have just come back. They are pages 106 and 111 of the printer's proof [handing].

The COURT. Is there any objection to Plaintiff's Exhibit D-1?

(No response.)

The COURT. It will be received.

(Plaintiff's Exhibit D-1 for identification received in evidence.)

326 The COURT. Will you give me the parties? It is a letter.

Mr. DIXON. That is right. I might say that this is the consent of TG, the German company, and IG to the transfer of the contractual obligations of Titan A/S to Titan Company, Inc., the new company.

The COURT. It is not signed, but I take it there is no objection on that ground.

Mr. WEBSTER. Which one are you talking about?

Mr. DIXON. That is D-1.

Mr. WEBSTER. No objection on that ground.

Mr. DIXON. June 15th are the letters.

Mr. WHITNEY. It is part of the same exhibit.

Mr. DIXON. What this was, your Honor, was the forwarding of the consents of IG and TG in this matter and the consents are attached.

The COURT. Page 109 is part of the same exhibit?

Mr. DIXON. That is right, and also 110, I believe. That is the next exhibit which we have not yet offered.

The COURT. Let me be clear about it: Page 106 through page 109 constitutes D-1.

Mr. WHITNEY. It is through page 110.

The COURT. Are there any comments on D and D-1?

Mr. WEBSTER. Not yet.

The COURT. From Mr. Dixon?

327 Mr. DIXON. No, your Honor. On Exhibits D and D-1 I was reserving my comment until I had finished with offering the other one, which I now offer: Plaintiff's Exhibit D-2 for identification, in order to complete that.

The COURT. This has no signature and no names.

Mr. DIXON. The approximate date of that, as far as we can determine, is August 9, 1929.

The COURT. Is that agreed to?

Mr. WEBSTER. This is objected to as incompetent. It is a copy of a paper found in our files, but there is nothing to show that it was ever written or received, nor is there anything on the face of the document to show that it has any legal significance at all.

The COURT. In view of the objection I will have to require you to prove it.

Mr. DIXON. It is all right, your Honor. We have asked for and subpoenaed from the defendant certain documents, including minutes and records, of Titan Company, Inc., which will clearly show authority for this and we will be glad to show that when the defendants bring them in.

The COURT. All right. For the present the objection is sustained.

Mr. DIXON. So we will have to ask you to bring those exhibits.

Mr. REA. When do you want us to bring them in?

328 Mr. DIXON. You better bring them in tomorrow.

Mr. REA. Will you tell us, please, what paragraph you request that under?

Mr. DIXON. I will be glad to do that; under general minutes, and so on.

I just want to ask counsel: I assume they are objecting to it—

The COURT. On the ground of competence.

Mr. DIXON. Not on the ground that it actually did not happen? I think we can show from their own records that it did. If we have to go to that we are perfectly willing to do it.

Mr. WEBSTER. I may say that we have the minutes and we will produce them if Mr. Dixon wants them. It seems to me a little unusual to offer an unsigned document. If we find overnight that the transaction referred to is as described in this memorandum we will be glad to make some statement about it in the morning.

Mr. REA. Mr. Dixon, I understand you want us to produce tomorrow morning minutes in response to paragraph 27 of the National Lead subpoena?

Mr. DIXON. I really cannot say at this time without consulting the subpoena and my own records and notes as to what particular one I would want.

The COURT. He wants you to come in and prove
329 Exhibit D-2.

Mr. DIXON. We will endeavor to comply and tell them what we want.

I just want to comment on Exhibits D and D-1, which I understand are in evidence.

Exhibit D is an agreement between Titan A/S and Titan Company, Inc., dated March 23, 1929, whereby all of the assets of Titan A/S were transferred to Titan Company, Inc.

Mr. WEBSTER. I do not know that it appears in here that all of the assets of Titan A/S were transferred.

Mr. DIXON. What I am talking about, your Honor, is the 1920 agreement and the things that were are concerned with. I don't care whether they transferred a boiler out of Norwegian territory.

The COURT. You mean the 1920 rights?

Mr. DIXON. That is correct, your Honor.

The COURT. The 1920 agreement and its progeny.

Mr. DIXON. That is right.

Exhibit D-1 is the consent of the two German co-conspirators, TG and IG, to the transfer of the contractual obligations of Titan Company A/S to Titan Company,

Inc., this new company, dated June 15, 1929. In other words, under the provisions of the German contracts Titan

320 A/S could only assign its assets, as far as the contractual obligations were concerned which related to TG and IG with the consent and approval of both of those companies, and that was given in Exhibit D-1.

Mr. WEBSTER. I would just like to add a footnote to the effect that the agreement on its face provides—

The COURT. Which agreement are you talking about?

Mr. WEBSTER. Exhibit D on its face provides that A/S transfers to Incorporated all its patents and patent rights and the contracts specified in 1 to 3; and those are specified in the agreement as the contracts of 1920, a license agreement of October 18, 1922, a contract of October 3, 1927, to IG, designated as contract A, and a contract of October 3, 1927, with TG, designated as contract D, together with protocol of the same date, concerning the said contract D, with additional agreements—it simply transfers the specific rights to contracts and the property referred to in there.

The COURT. All right. Mr. Whitney?

Mr. WHITNEY. No comment, your Honor.

Mr. DIXON. I now wish to offer in evidence Exhibit E for identification, the same being the contract dated January 1, 1933, between Titanium Pigment, Inc. and Krebs Pigment & Color Corporation.

Mr. WHITNEY. I will just say for convenience, your Honor, that not anticipating we ought to print that 331 we have not yet done so, because it is annexed to our answer in printed form, but in view of the printing of the other documents we will arrange to print it at the appropriate place in sequence.

The COURT. This proposed offered agreement is between Titanium Pigment, Inc. and Krebs Pigment & Color Corporation?

Mr. DIXON. That is correct, your Honor.

The COURT. Is there any objection?

Mr. WEBSTER. No objection.

The COURT. Then Exhibit E is received in evidence.

(Plaintiff's Exhibit E for identification received in evidence.)

Mr. DIXON. I wish to comment about this contract or exhibit as follows: that in subsequent exhibits it will develop that Titanium Pigment Company, Inc. became National Lead Company, and Krebs Pigment & Color Corporation became du Pont for the purposes of these agreements.

The first part of the agreement is such that both companies, Titanium and Krebs, owned certain United States letters patents which in the opinion of their respective counsel present causes of controversy in respect of claims of mutual infringement, and that in order to avoid those controversies each party desires to enter into a license agreement of the scope and character set forth
332 in this particular agreement.

Article I then proceeds to define the Licensed Field in substantially the same general language as is contained in the previous agreements, namely, that it includes all methods, processes and apparatus in the field of manufacture and use of titanium compounds containing two per cent or more of titanium in a chemical, mechanical or physical combined state and mixtures thereof which can be used as pigments whether or not adapted for other uses, and all such compounds and mixtures which can be used as pigments, whether or not adapted for other uses.

333 In Article II both of the parties to this agreement grant to each other irrevocably and non-exclusive rights and licenses within the United States to use all processes, methods and apparatus of manufacture now or hereafter, or during the term of the agreement, used by either party, and as to which it is free to grant rights whether or not patented or subject to patent; and under and in accordance with any and all United States letters patent now or hereafter, and during the term of this agreement, owned by it or otherwise at its disposal for the grant of licenses relating to and within the limits of the Licensed Field, and to sell the products resulting from the use of such processes, methods and apparatus whether or not patented or subject to patent throughout the United States of America, its colonies and possessions, present and future, Mexico, Central America and West Indies and South America. In other words, it relates to United States patents owned by either party which they then owned or during the term of the agreement might thereafter ever acquire, and the right to use them and sell products manufactured thereunder in the territories that are specifically mentioned, and those are territories which are identical and comparable to the territories allocated to, as I have shown, Titanium Pigment Company under the 1920 agreement.

334 Then follows that notwithstanding the limitations of the Licensed Field it was understood and agreed

that each party shall have the right to sell within the licensed territory as well, which would be North or South America any and all intermediate products manufactured under the license hereby granted. Then, it is further understood that all purchases from either of the parties thereto of any products which shall be manufactured under the license shall be privileged to use the products so purchased for any and all purposes—a slight difference in that provision from the other ones in which there was a specific provision imposing the obligation.

And then follows the language that nothing in the article shall limit or restrict the right of either party to grant the third parties licenses of the same character and scope as the licenses granted by it.

The Court. That makes it explicit but non-exclusive in character.

Mr. Dixon. That is right. Then follows Article III, which is the know-how provision of this contract which we have found in all of the others, that each party shall, during the term of the agreement, disclose to the other as promptly as may be practicable full technical information with respect to all methods, processes, apparatus
335 and products within the Licensed Field, including, when requested, specifications and claims under any United States letters patent owned, and under any application for United States letters patent filed or contemplated to be filed by it.

Now this provision is a combination, not only being a know-how provision as in the other contracts but also the one relating to the obligation to disclose patent applications, as well as patents to the end that the knowledge and experience of each party in the Licensed Field shall be at the full disposal of the other within and for the territory of the license granted by this agreement. And then it provides that these disclosures shall be made only to officers designated for the purposes in writing.

Now Article IV is one relating to the royalty provision. There was a royalty provision here which is rather difficult perhaps to follow, but it was based upon the production of each of the two companies at that particular time, and somehow if the production of one exceeded that ratio then there was to be a royalty paid on that basis. It was, however, limited to \$10,000 in any one calendar year.

The Court. \$10,000 excess in any year. The net balance can't exceed.

Mr. DIXON. That is right. That was the maximum royalty which would be due or could possibly be due under the contract.

The COURT. It might cancel each other out.

Mr. DIXON. The facts are that during this—I was going to tell how much had been paid, but that is already in evidence.

Mr. WHITNEY. I said that. It is already in evidence. Go ahead.

Mr. DIXON. That is all I intend to say, your Honor. The facts are that each year under this agreement up until 1936 Krebs paid to Titanium Pigment or du Pont paid to National the \$10,000, and that was all. And all royalties ceased at the end of 1936. In other words, no further royalties were to be paid after that date.

The COURT. What provision is that? Oh, I see it.

Mr. DIXON. The following one, "It is understood and agreed that no royalty"—

The COURT. I see it.

Mr. DIXON. So that du Pont in fact paid \$40,000 to National Lead as royalties under this agreement.

Now follows Article V whereby each party agrees while the agreement is in force to use its best efforts to assist the other to acquire on terms as favorable as possible to the other an irrevocable and non-exclusive right and license to manufacture, use and sell within the limits of the Licensed Field and within the territory of the Licenses granted by this agreement under any United States patents or applications therefor owned by it or otherwise at the disposal of other companies, firms or individuals, foreign or domestic, under which such party itself thereto is licensed. The purpose of that was to principally obligate National on the foreign commitment.

Mr. WHITNEY. Is that so? Where do you get that from? That is the usual provision in all license agreements.

Mr. DIXON. All right. Then Krebs took the obligation to offer to the foreign associates of National that might be designated by National—I am now using National in its present sense, at this time it was Titanium Pigment Company—before offering to any other person, firm or corporation the opportunity to acquire those patents upon terms that could be mutually agreed upon and worked out.

And then follows the termination or clause 6, the dura-

tion provision of the contract which, as we found in the other contract, in substance—oh yes, I wanted to point out that these licenses provided for in Article V to the foreign associates were supposed to be—or in the contract it provides that they are irrevocable and non-exclusive.

The COURT. In other words, the licenses survive the termination of the agreement.

338 Mr. DIXON. That is right. Then the agreement could be cancelled by either party at any time after December 31, 1933 upon three years' prior notice in writing, but the cancellation or termination of it was not to affect any licenses theretofore acquired by either party from the other.

Then follows Article VII, which provides that titanium—

The COURT. A mutual release.

Mr. DIXON. That is the release provision. I wanted to point this part out in the release, your Honor, if I may direct it to your attention.

The COURT. Go ahead.

Mr. DIXON. "releases and forever discharges the other from any and all claims for infringement of any and all United States letters patent relating to the Licensed Field now owned by it or hereafter during the term of this agreement." I direct your Honor's attention to the "hereafter" part.

The COURT. What does it mean "with the right to sue for past infringement"? You mean that is reserved? Well, you don't have to take a position on it. I am not clear on it.

Well, we won't have time for Mr. Webster's comments. We will adjourn until tomorrow morning.

(Adjourned to December 7, 1944, at 10.30 a.m.)

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK; December 7, 1944.

10:30 o'clock a.m.

Trial resumed.

Mr. WEBSTER. If the Court please, there are one or two matters of a preliminary nature that I might mention at this moment. The other day I suggested that in view of the rules your Honor would probably not expect us to

take an exception to rulings regarded by us as adverse, and notwithstanding the care of the reporters, whose work I think is admirable, I think your Honor's ruling on that is somewhat obscure as recorded in the record. What it says is, at page 156, "Whether that be the rule or not I will give you an exception anyhow to whatever adverse ruling you wish to take it, and thus save time."

I think what your Honor said was: "Whether that be the rule or not I will give you an exception to whatever rulings I make, and thus save time."

The COURT. Yes. I think that is a more accurate statement. The intention was quite clear, but I think it is well that you call it to our attention so that the record will be equally clear.

340 Mr. WEBSTER. There are other things that I think we will be able to adjust in the record by agreement, but I thought that was of such a nature that it ought to be brought to your Honor's attention.

Now my diligent associates have found in the files a printed copy of Government's Exhibit A, the 1920 agreement, which we believe to be more accurate than the photostatic copy of a typewritten copy which was offered for that purpose, and I suggest, pursuant to the indication yesterday, that that be substituted as the original Exhibit A for the one now so marked.

I may say that it contains on page 3 a typewritten amendment of paragraphs V(a) and (b).

Now I have first marked this so as to remove the former (a) and (b), but I believe that perhaps the proper thing to do is to—

The COURT. Incorporate them both.

Mr. WEBSTER. Simply insert the amendment at a convenient place following those two originals—

The COURT. Do you know when the amendment was inserted?

Mr. WEBSTER. It shows on its face.

The COURT. Very well.

Mr. WEBSTER. It was made as of March, 1928.

The COURT. Is there agreement that the exhibit suggested by Mr. Webster be substituted for Plaintiff's Exhibit A?

Mr. DIXON. As far as the Government is concerned, that was our intention, from the start, your Honor, to have that in.

The COURT. Is that agreeable to you, Mr. Whitney?

Mr. WHITNEY. Yes, your Honor.

The COURT. Then I will instruct the clerk to strike out the mark on original Exhibit A and to mark the presently tendered document as Plaintiff's Exhibit A.

(Exhibit substituted and marked as above indicated.)

The COURT. Are you going to reprint that in your printed copy, Mr. Whitney?

Mr. WHITNEY. Certainly, your Honor. I do think that perhaps Mr. Webster will be so kind as to shoulder that burden. We had never seen this document. Two days ago we were told that it did not exist. We don't know anything about it. We just took it and they handed it to us. We will be glad to reprint it for them, or they can arrange the printing.

Mr. WEBSTER. What is being done about that is that in the printed copy which Mr. Whitney was so kind as to furnish, the proof has been compared not with 341a the original Exhibit A but with the new corrected reformed Exhibit A, so that when your Honor gets the revised proof from the printer it will be an exact copy of the new Exhibit A.

342 The COURT. Do I understand, Mr. Whitney, that these preliminary sheets, in this new volume you handed me include the little supplements which you gave me yesterday?

Mr. WHITNEY. Yes, your Honor.

The COURT. So I can destroy that?

Mr. WHITNEY. Yes, your Honor.

Mr. DIXON. If counsel are finished I might add, in view of the fact that defendants have been so kind as to print the exhibits we will not burden the Court with having to take care of them and we will, therefore, assume the responsibility for the exhibits that are offered as far as their custody is concerned.

The COURT. Very well. Then I won't have to deal with the originals unless at the close of the case I should care to have them. That would be a great convenience.

You may proceed.

Mr. WHITNEY. If your Honor please, Mr. Webster says he does not want to say anything about Exhibit E, which is the last one admitted in evidence and commented upon by Mr. Dixon. That is the agreement of January 1, 1933 between Titanium Pigment Company, Inc. and Krebs Pigment & Color Corporation which, as your Honor is aware, were later respectively taken over by National Lead and 343 du Pont. And no point is being made in this case as to the separate corporate identity of Krebs through

du Pont so I must treat this case as a du Pont agreement.

But going to the clauses, I respectfully call your Honor's attention to the fact that the whole tenor and language of the agreement is utterly different from any of the earlier exhibits.

The COURT. Are you now talking about the contract annexed to the answer?

Mr. WHITNEY. Yes, your Honor, and I am using that copy. It is not yet printed in the volume, but it will be.

This agreement we believe, your Honor will find, is an agreement of essentially a patent character carefully drafted having regard to the needs of the parties inside of the United States of America and contrasts with the 1920 and other contracts which are European or International in language and tenor and which fall within the description given by Mr. Dixon on the first day of the trial.

Being essentially commercial contracts, by which Mr. Dixon said that he distinguished what were essentially patents and know-how contracts, a distinction which puts Mr. Dixon and us upon common ground—I will say that preliminarily, your Honor, because it would take a great deal of time, which I am not taking, to go through the earlier contracts, Exhibits A, B and C, to point out
344 the differences in language and tenor.

The COURT. You need not do that now.

Mr. WHITNEY. But I put great weight upon that because of the allegation in the complaint that although we agreed to this contract Exhibit E in writing, and not orally—and the point I would like to leave with your Honor is—according to the terms of the other agreement I think a misconception has arisen on this matter from its very beginning and has been that you could not have an oral agreement and be bound by all its terms, when they contrast so extraordinarily, page after page after page, and every kind of detail, with the terms we already agreed on in writing.

One can well see where the misunderstanding arose in Washington. If one takes the very brilliant summary of the earlier agreement that is found in the Government's complaint, and which was all that we knew about prior to the trial you might have the impression that they only varied in perhaps two or three major aspects from our agreement, and then you suppose, reasonably, that the defendants might have made our agreement in writing, and then orally agreed to these two or three aspects—it is quite different. But when one sees these agreements as

they actually existed, the improbability of any such oral agreement arises to such a point that I submit that
345 the Government would have to bring most cogent evidence later in the trial in order to tie the two together. Of course we do not think that evidence exists, but that is anticipating.

Now, if your Honor please, referring back to the agreement in terms. First I will run through the 1933 agreement to which we were a party.

The COURT. That is Exhibit A in your answer and E in evidence?

Mr. WHITNEY. Yes. Exhibit E at the first page, 25. It opens with the recitals which were read by Mr. Dixon and he read the second and third, being recitals that whereas each owns patents and in the opinion of their respective counsel they present causes of controversy and respective claims of mutual infringement, and each of the parties in order to avoid such controversies decided to acquire from the other defendant a license—and so forth.

Now the Government has introduced the document in evidence, without reservation, if that is the fact. And there is no doubt that is true. I must not take a different position, but I do not anticipate your Honor will have to be burdened, as has been done with similar causes of issue, in detailing these patent controversies. At least I hope not. I think it is a common ground that this recital is true and therefore the basis of this agreement is that in fact there were those—

346 The COURT. Pause a minute. I want to get clear about a doctrine in evidence that I am not familiar with, a doctrine as to which I was almost falling into error until you rescued me the other day. Do you suggest when on an opinion from counsel, an exhibit, being a contract between A and B, the defendants in this case, which says, Whereas thus and thus is a fact, we agree as follows, that everybody is bound by that statement of fact contained in that agreement and that I must find it as a fact in this case?

Mr. WHITNEY. Well, no. I accept your Honor's interpretation which I think is absolutely sound, if I may say so with respect: that that would not be enough, but the Government, as I understand it, does not charge that this statement was untrue. It does not charge that there was not a bona-fide patent conflict, and I take it that as the Government introduces the document that it goes this far: that if it charged that the document was untrue in

this recital of facts it would fall upon the Government to introduce evidence to that effect.

The COURT. I was under the impression from the Government's opening, and I do not recall now just how I got that impression, that the Government regarded the controversies re patents and patent infringement as
347 rather unsubstantial. I may be in error about that.

But that was the impression I formed in my mind in listening to the Government's opening.

Mr. WHITNEY. Well, your Honor, that is right, but there is nothing of that sort in the complaint.

The COURT. That may be. It is not the connection, and I am only thinking.

Mr. WHITNEY. I am not asking the Government to make a concession right here and now, but I hope they will think that over because as I understand their case, from the complaint itself, of course in theory it should be their whole case, although they may amend with your Honor's leave, that we won't need in this case to go into the points of the most dreary part of its larger cause, whether or not in that there was a conflict. If we need it we are ready with a great deal of evidence on the subject.

The COURT. The only reason I engage in this colloquy is that if you do what is generally accepted and not accept it—I let the idea jell in my mind, and it is one of the fixed ideas as we go along, but I want to suggest the idea has not jelléd in my mind because of what has occurred. We have much behind them.

Mr. WHITNEY. Perhaps we will see further as we go along, your Honor. But I am sure your Honor
348 grasped that I do not need to rely on this if the Government does not want to rely on it in that way. If the Government wants to litigate that issue we will litigate it.

The COURT. Certainly.

Mr. WHITNEY. And that brings us to the contract based upon the recital of the patents conflicting, and your Honor has details of that in that little brief I submitted in which I went into Mr. Justice Brandeis' opinion, and I merely mention that because the opinion came down in 1931 and this contract was negotiated in 1932 or 1933 and I have no doubt that the counsel to whom reference is made in the contract were influenced by what has been pretty much the charter on this subject.

The COURT. You had better give the reporter the

name of the case.

Mr. WHITNEY. I am referring to Standard Oil Company of Indiana v. The United States, 283 U. S. 163; unanimous opinion in the Supreme Court by Mr. Justice Brandeis, except that Mr. Justice Stone did not sit.

349 Now we come to the articles, and as to the first one, Mr. Dixon said that this was substantially the same general language as in the previous agreements; that is, the definition of the Licensed Field. I do not quarrel with Mr. Dixon's statement. It is correct. But it is meaningless, because necessarily these contracts were both dealing with the titanium field and therefore of course substantially the same general thing would be much the same. However, what would be remarkable would be if there were any difference of language. Now as to the form of the language, they are entirely different. They did not come at all from the same draftsman and certainly this one was not taken from the 1920 agreement.

The COURT. I would not have been impressed by that. Plagiarism in the law is a permitted art.

Mr. WHITNEY. Well, your Honor, the argument of course is that we entered fully into a pre-existing conspiracy, and the argument has been that the 1920 agreement was the pattern of all the subsequent agreements including ours, and therefore if that were true one would naturally expect to find in this agreement, perhaps not identical language, but the same form and tenor, the language as the pattern that was being followed.

350 Now there this happened to be a difference of substance, because our Licensed Field is confined to this: "which can be used as pigments". That is not in the 1920 agreement. Your Honor, Mr. Dixon and your Honor will observe that I am not saying that that is a great point. It is only that it indicates the limited nature of our intention and the care of our draftsmanship distinguishing it from the 1920 agreement.

If your Honor please, in Article II there is a grant of a non-exclusive license, and in that article which was read verbatim by Mr. Dixon, or most of it, he also is weighting upon the phrase "or hereafter." In other words, he emphasized the words which covered, that the license did not merely, under the then existing patents, cover those, but extended to the future or after-acquired patents.

I only have these comments: first I know that one of the most active discussions in the law today is as to the extent of validity of agreements relating to future patents. However, if those patents are, per se, illegal, then the law must have changed because the agreements in the Standard Oil case, 283 U. S., covered future patents.

Now that is a strong case for these reasons: first, 351 it is not old law which has perhaps come into doubt through some modernization of another court, but it was a unanimous decision and was concurred in by such Justices as Holmes, Brandeis, and the then Chief Justice. It is not a case that the enterprising editors of law reviews would expect to find reversed.

Now the second thing is that those contracts were much more extreme than this, because the parties to those contracts were three of the largest oil companies in the United States—Standard Oil of New Jersey, Indiana and the Texas Company, as well as a fourth party—and they made an agreement that covered all patents that might issue upon inventions that might be made at any time within seventeen years after the date of the agreement.

I have gone to the record about that, your Honor, but there is a reference in the opinion to the fact that the patents ran until—the reference in the opinion is general, but I have gone to the record for the facts.

Now more important I think to your Honor's mind must be the underlying reason and the underlying reason is that those agreements were justified upon the basis of the fact that because of existing patent conflicts they were essentially liberalizing, and that was where the Department of Justice had a misconception. I am very aware of these things because I participated in the 352 Department of Justice on the wrong side of this case and participated in the misconception in 1926 or 1927.

Mr. WEBSTER. I was about to remark off the record—
(Colloquy off the record.)

Mr. WHITNEY. Well, as Mr. Justice Brandeis pointed out, and of course it is consistent with the whole essence of the antitrust laws—that is the reason the Circuit Court of Appeals has had very often to be reversed, they think that it is the rule in the case and they try to follow it and they are reversed in that only because the case has gone the other way—they look at the realities. The reality was that these were the major oil companies. Therefore Mr. Justice Brandeis said, you have to treat

them differently than if they were just A and B. But having treated them differently, he said, there is no reason why they have to litigate conflicting patents. They may be settled by agreement, and in order to settle by agreement necessarily, he recognized, they must enter into cross-licensing agreements. And, inasmuch as the purpose of the cross-licensing agreements was to enable free operation of the actual manufacturing, their refining, they would be useless unless they covered future patents for a reasonable period ahead.

Now under our agreement it could never be more
353 than three years because, as we will see, and as your Honor noted yesterday, it could be terminated any time within three years. And that is the situation.

Now quite a different situation arises, where it is found as a fact that the agreement in question may have been entered into for the deliberate purpose of monopolizing an industry or for some other wrongful end; thus, for example, in the Glass case, the Hartford Empire Company was found to have created a structure in the industry in the United States for the precise purpose of monopolizing it through the use of patents as the instrument and fixing prices and so on, and in that event the whole thing fell, had to be struck down, including the future patents.

We may have more enlightenment upon that, and particularly the decree, as your Honor knows, when the Supreme Court renders its decision which we are looking for any Monday.

But the case is distinguishable completely on the merits. Just like the difference say between the Appalachian Coal case for the defendants and some other case for the Government, because that was the type of case in which there was a general restraint and therefore consequences flowed from that which do not flow unless there is restraint.

354 Now I would like to come back to the agreement.

That is only on the "or hereafter". In the last part of that paragraph which defines the United States and Mexico and Central America, et cetera, Mr. Dixon said that that was identical with agreement A, and I only pause to say that is not so, because Canada falls within the definition of the Titanium Pigment field in Exhibit A, but falls outside in this exhibit. And I am not making a point of that, your Honor, but the real reason that it in-

terests me is that again it evidences the fact that the Government has gone at this in sort of a general way, and the use of a word like "identical" which ought to be a word of precision, when it is wrong, does not evidence anything more than just a lack of clear understanding of a situation or a lack of close enough study, and that is therefore going to be imposed upon your Honor.

Now the next to the last paragraph in Article II was read with considerable emphasis by Mr. Dixon, and it reads as follows—it is only one sentence: "It is further understood and agreed that all purchasers from either of the parties hereto of any product intermediate or final of manufacture under the licenses hereby granted shall be privileged to use the product so purchased for any and all purposes."

355 Now, to my mind that is a plainly liberalizing provision. It merely grants a privilege and the privilege is to the customers to do anything with the product that they saw fit. It might have been written by the author of the Carbice opinion.

The COURT. I take it from several of your remarks that I am not listening to the author of the agreement.

Mr. WHITNEY. No, your Honor.

Now, Mr. Dixon's comment there was that this is slightly different from the other agreement in that the other agreement imposes requirements upon customers. And now turning for example to the French agreement—it is in the printed document at page 33; that was the Exhibit B, your Honor; page 33, Article IV—there are these provisions:

"The Societe undertakes, notwithstanding the provisions of Articles II and XX above, not to sell, directly or indirectly for or to be destined for Titan's territory, any invention, improvement or anything relating to the 'Licensed Field'; Titan on its behalf undertakes not to sell directly or indirectly for or to be destined for France such inventions, improvements or anything relating to the 'Licensed Field.'

356 "Societe and Titan mutually undertake to impose, within reasonable limits, upon their customers, the obligation set forth in the preceding paragraph."

I skip to page 35, the 7th line:

"Although the above Articles II and III permit the customers of Titan and Societe freely to sell products defin-

able under the term 'finished articles', the two companies will have to see to it that their respective customers do not compete with one or the other in their respective markets and if one of the companies becomes aware of such competition from a customer of the other company, the latter should take the necessary measures to prevent the customer from continuing such competition. It seems impossible precisely to envision the measures for the application of this principle, but periodic conferences will take place between the two parties for the purpose of examining market conditions and to discuss the measures to be taken."

Your Honor would find similar provisions in the German agreement, for example, different in language, at page 63 of the print. Now, when Mr. Dixon laid emphasis upon those provisions when going over the contract yesterday afternoon, and when he then came to our contract and said that this paragraph was slightly different, I think he was indulging in a euphemism. The slight
357 difference is the precise difference between the grant of a liberalizing privilege and the imposition of a restrictive obligation, which is what these laws are all about. I am not saying that Mr. Webster's client does not have a defense. I just don't know anything about it. They may have and they may not. But I am only saying that that is their case and their problem about those two contracts. It is not slightly different from our problem; it is different from our opinion by precisely that measure which represents the difference between an antitrust problem and the absence of one.

The next clause your Honor pointed out was making the non-exclusive license explicit. That is the last of Article II. We don't need to repeat that. Then Article III is the one about know-how, and Mr. Dixon read practically all of that article. Now I take it that the applicable principles are these: first the exchange of know-how is not of course per se illegal, like an agreement to fix prices, say, because Mr. Dixon said in his opening at page 85 that he was going to ask your Honor to compel us to grant know-how. Of course his distinction is between an exchange of know-how between two parties and an offer of know-how to the entire industry. Now, the question in
358 every know-how case is whether—although I don't think there has ever been one—it is reasonable under the circumstances for the two companies to exchange know-how because that is always the question in

every antitrust case other than a per se illegality case. Now on that these considerations apply: (a) An exchange of know-how is at least prima facie beneficial always, because it means that each of two manufacturers has a wider knowledge than it had before. In other words, I think the burden is on the other foot, as it were, that if parties are not to exchange know-how from the point of view of the welfare of the ultimate consuming public, whatever be the law they might have to defend, they are not exchanging it. But now, then (b) the time, and here I think is the point that the Government has missed and it is the heart of the matter—the time that know-how is particularly beneficial is when a new art is being developed, because the universal experience is that the development of an art goes through broadly three stages; first, what might be called the basic patents. When you have only got a basic patent you haven't really got anything for the public, the consumer. You then get a stage of development of operating methods and techniques and from those some general basic improvement patents—they are improvement patents but they are still basic patents—and what you find is that after the public has learned

from the basic patent that something can happen
359 the big companies are apt to go in and each try to develop it in their own laboratories and research departments. And then they each begin to get patents of their own as to methods and techniques and operations and so on, and generally a number of those patents are good, and then comes the necessity for cross-licensing and the desirability of the exchange of know-how which simply means that each one has got a crude process at that stage, and if each one likes what the other one is doing they will do that much better. And then comes the problem for the law to have a look at it and see whether it is what I have described in fact or whether it is working into a restraint.

The third stage is when the art is sufficiently launched so that each of the companies is really engaged in the business, and then it may be—of course there never has been a case that says so—but it may be that at that stage they ought to cease and desist from exchanging know-how because they ought to compete not merely as to price and quality and so on, but perhaps they ought then to compete even as to the better processes. That is something that is not in the books; it has never been presented. And we think that in our case we have been ultra-legal, if I may

coin a phrase, because when we reached that stage whereby on the whole we were able to operate on our own, 360 we cancelled this exchange of know-how five years ago.

Toward the end of that know-how article, III, is the provision about exchange of knowledge, the end of the long first sentence in article III, "To the end that all the knowledge and experience of each party in the Licensed Field shall be at the full disposal of the other within and for the territory of the licenses granted by this agreement." Now there your Honor will begin to discern the European discomfort. There was available to us within the only territory in which we were interested, which was the Western Hemisphere, except Canada, all the knowledge and experience available to National Lead, and that was, to put it simply, an enormous boon to us. That is how we were able to develop this competitive position. There was available to National Lead within the same territory ours, but it was not available to anybody in Europe because it was only available within the territory, so that we got the European knowledge without ours going back.

The COURT. I wondered about that.

Mr. WHITNEY. I don't know what they did with it when they got it. They may have told the French and Germans—

The COURT. Were they obligated under the agreement with the French to tell them?

361 Mr. WHITNEY. Well, they were.

The COURT. Would it have been a violation of your agreement if they did so?

Mr. WHITNEY. Yes, certainly. Your Honor will probably see a good deal about that, because throughout the 1930s as a result of this, and as I indicated before—and this is surmise, but I think it is a surmise the Government will permit me to indulge in—I think the answer was that du Pont & Company, it is alleged in the complaint and admitted, is a great big company, and it is famous the world over for its research and development. It used to be proven on every woman's leg and now it is proven in every parachute, and in all fields of chemistry. And the answer was that National Lead were willing to make this narrow agreement with us in order to get the benefit of our research and development capacity. And I suppose it is the same thing, the size of the company, that tempted the Government to include us as defendants in a case in which we believe your Honor will find we do not

belong. There is a sort of irresistible temptation there.

Now if your Honor please, I pass to article IV which is the royalty provision and only mention that that provision ran only for three years. Unlike the rest of the agreement it was not a permanent provision subject to termination every four years. It ended

December 31, 1936. It is significant that what happened in fact was that in each of those four years we had to pay National ten thousand dollars, and of course what that meant was that National Lead was way ahead of us, and that is when we were catching up. I think chart 5 shows us catching up there. So, we were paying them royalties.

The COURT. And I suppose that would indicate that you were ahead of them.

Mr. WHITNEY. We were ahead of where they thought we were going to be. That is the catching up, you see. We were producing more than they thought we were going to be able to produce.

The COURT. That is what I mean. That is why you were paying them a royalty.

Mr. WHITNEY. Yes.

Mr. WEBSTER. It indicates that du Pont was not only willing to give us a license under its patents but was willing to pay us something for our license under the patents.

Mr. WHITNEY. In all events, on December 31, 1936, it ended. I think it is of no legal significance whatever, but if it is of legal significance it is eight years ago, so I am sure it would not interest your Honor.

I skip down to article V. Mr. Dixon laid emphasis upon the first sentence which he read, and that is where I interposed.

"Each party hereto agrees during the term of this agreement to use its best efforts to assist the other to acquire, on terms as favorable as possible to the other, an irrevocable and non-exclusive right and license to manufacture, use and sell, within the limits of the Licensed Field and licensed territory, under any United States patents or applications therefor owned by it or otherwise, at the disposal of other companies, firms or individuals, foreign or domestic, under which such party hereto itself is licensed."

Now that is the usual provision of any wise patent agreement, that if either party—if and when either party extends the license to third and fourth and fifth parties

they will get back parallel rights, because no one who thinks in advance and is a careful draftsman of his agreement or a good patent counsel is going to agree that he will give a non-exclusive license to somebody else and somebody else might pass on rights to a third party and that third party not be obligated to send it back to the first party. But that is merely a liberalizing of the art.

I don't see how that could under any circumstance
364 be a restraint. That merely spreads the circle of knowledge wider.

Then the next paragraph is the one that brings into play the European situation and it is as follows:

"Krebs further agrees that during the term of this agreement it will offer to any foreign associate of Titanium designated by Titanium before offering to any other person, firm or corporation the opportunity to acquire upon mutually satisfactory terms and conditions an irrevocable and non-exclusive license," and so on. Now, that was in effect a first right of refusal or in effect du Pont was saying, If we have a patent we will give a license to your associates. And of course what happened was, as has already been indicated—Mr. Gesell says if we decided to license, anyway. And of course what happened was National Lead was much stronger than we were. They had a greater number of patents. They were further developed in the art, with the know-how. They anticipated, as I mentioned before, that we would have a lot of know-how. In order to get their license and their know-how they were in effect saying to us we must get something for our associates.

Now this article VII, of which we I suppose knew in some general way, but of which we never knew until in this courtroom in detail, required them to get
365 back the same rights for their foreign associates, and obviously what happened was there was a trade, and the upshot of the trade was we said, Well, we will give non-exclusive license to your associates if we are going to give it to anybody, before we give it to anybody else. Well, that cut them down by two notches, first because their foreign associates did not get it at all unless we decided to give it, and secondly, they only got it first. Your Honor knows that in these matters of course you always negotiate with one first and then with another, and the first means that the first license would be to their associate in France or Germany, leaving us free to give it to other people.

Now, five years later we changed that and made it exclusive subject to ourselves only, non-exclusive to others. That is to say, on degrees of what you might call restriction, we restricted ourselves a bit further in that we gave them each year, gave the foreign associates, exclusive rights.

The COURT. Instead of non-exclusive rights?

Mr. WHITNEY. Instead of non-exclusive rights. That was in 1937 to 1941. A new contract, a new license grant was worked out each year reserving always to ourselves the non-exclusive license, and that of course was con-
366 fined in each year to the then existing patents which were named, or it was more apt to the applications that we had out in Germany or France. I only mention that so that there will be no risk that I am misleading your Honor by acting as if this were the story throughout, and having mentioned it I think it fair to add that of course the explanation of that is that by an agreement made January 1, 1933—there was an agreement made when Dr. Bruening was Chancellor of Germany, and we were living in a golden age of happy illusion, and doubtless our people felt that maybe some day people might want to go to Germany and France, and by 1937 or 1938 the whole world picture changed, and it was perfectly obvious that there wasn't going to be anybody in Germany allowed to make titanium pigments except the IG Company. So neither the one or the other was in any way restrained. We did not make any restraint on either party. In each period we only gave a license under patents, a pure patent agreement, a pure licensing agreement, and the first time it was only non-exclusive, and the second time what made it exclusive was an external factor, but even then we were successful in reserving to ourselves the right in ourselves.

Now then I turn to Article VI, and that is the termination article, and I only mention that although agreement A, as your Honor pointed out yesterday, would
367 require at least ten years to terminate, indeed theoretically it could require 14 years and 364 days, if you permit five years to go by, and this required only three years. I think that is not without importance because it shows the capacity of either party very promptly to put an end to the whole agreement if it saw fit, and it is not worthy of undue emphasis, I don't think.

In Article VII we have about three different provisions, Articles VII and VIII, three different provisions, which again I submit to your Honor are characteristic of patent license contracts, the sort of provisions that would not

have been written except by people who were thinking in terms only of licenses under patents.

Now, the first is a release for claims for past infringement. Obviously you could not have a cross-license for the future without a release for the past. You could not be litigating on the one hand and licensing on the other. The second paragraph is a release of customers that is only beneficial to the industry. Your Honor understands that the consumers of these products are mostly other manufacturers,—not entirely. And, finally, the agreement that it shall not be assignable by either party. It is essentially personally in character, unlike the other agreements, which were, assignable in whole.

368 If your Honor will permit, I am most of the way through, but I am going back for a moment to the other agreement, Exhibit A, just to mention two or three of the paragraphs by contrast. I have passed over the definition sufficiently without repeating it, but at page 3 in II and III are the reciprocal grants which Mr. Dixon emphasized, and he particularly emphasized the two-line clause that begins on page 3 on the 14th line of the page, two lines above the end of the sentence, reading as follows: "but said license shall not permit the licensee to make any sale directly or indirectly in or for any territory within North America."

And there is a reciprocal clause in III and that is similar to the one I have referred to in the French and German agreement, and it is absent from ours.

As to mere form, for instance, in the great long paragraph V, which is the paragraph working out the exchange of licenses, there is nothing of that sort in ours, as there would be if this were the pattern.

Then in VI, passing over a paragraph that I don't think of much substantive importance now, but that evidences changes, that paragraph A, about recognition of validity is not in ours. That is VI(a) at the bottom of page 7.

The royalty provisions are completely different. 369 Those are VI(b), pages 8 to 10. And then another major difference in VI(b) on page 10, about the appointment of a sole agent which of course is a commercial provision. It does not appear in ours.

Then that important note (N.B.) provision on page 11, which is under (c) upon which Mr. Dixon placed great emphasis, describing it as follows:

This is a clause obligating the parties to do whatever was possible to prevent sales by customers in the other party's territory.

And Mr. Webster, you will recall, said that it had never been enforced and necessarily he renounced it or some such phrase. But again it of course is not in our agreement or anything of that sort. And so with most of the rest of the clauses. Just for example, as evidence of the closeness of the relationship in (a) in the compulsory element, is Article VIII on page 13 requiring the other party to cause its officers, agents and employees to assign. We were not required in that way; we just exchanged.

Then I go through other clauses I have mentioned like the assignment clause and the termination clause and come to Article XIV, and Mr. Dixon said of that that this paragraph gave it its most forceful sanction from the point of view of the charges of the complaint. And it is
370 that complete absence of sanction, an apt word that he chose, which distinguishes our part of the case.

And Mr. Dixon then construed the first paragraph to mean that under article XIV the parties could not license for sale even in their own territory. That of course is absent from our case.

Mr. WEBSTER. It is absent from Exhibit A.

Mr. WHITNEY. Right. Thank you. I don't want to prejudice either party. So, there is a battleground for that.

Now, your Honor, my conclusion on that is just to suggest to your Honor that as our grants of licenses to Zirconium and Virginia Chemical come into this case your Honor will doubtless be watching them closely to see whether they contain within them the provisions that were we parties to article XIV we would be required to put into them as one of the tests as to whether we are one of the parties to article XIV. And I have reference particularly to the whole article XIV.

Then there is an important provision, Arabic 2, on page 16, of which Mr. Dixon said: Anyone who subsequently became licensed under this agreement or became a party to it would be found—and then he used his normal phrase—and that then became the pattern of the agreements.

370 Your Honor and my other friends have been very patient, and I am closing now with the statement that Mr. Dixon I think has made the issue a very practical one as to whether this agreement which was the foundation of the conspiracy alleged against the other defendants was the pattern of our agreement or was not.

The Court. I think we will take a recess.

(Short recess.)

371 Mr. NIXON. May it please the Court, on behalf of the Government may I reserve at this time some time to reply at a more appropriate time.

The COURT. All right. Let us understand each other, gentlemen. We are not engaging in argument on the case. All I am permitting thus far is comment on the exhibits because manifestly they are complicated and I think it would help me comprehend the case as we want really if I had the Government's facts and defendants' comments. But I do not want to engage in argument in reply.

Mr. DIXON. What I intended, your Honor, in view of the legal references made at this time, before the end of the trial—

The COURT. Oh, of course; you will have ample opportunity.

Mr. DIXON. Because obviously we are not going to argue our case at this time.

The COURT. Correct.

Mr. DIXON. And do not intend to.

The COURT. Correct.

Mr. DIXON. We offer in evidence Plaintiff's Exhibit E-1, the same being agreement between Titanium Pigment Company, Inc., Krebs Pigment and Color Corporation, and E. I. du Pont de Nemours and Company, dated January 1, 1936.

372 The COURT. Is there any objection other than those that have already been noted?

Mr. WHITNEY. No objection.

The COURT. It will be received.

(Plaintiff's Exhibit E-1 for identification received in evidence.)

Mr. DIXON. This document is self-explanatory. It is merely an assumption of all the obligations that were imposed upon Krebs by the previous contract by du Pont de Nemours and Company, which has been covered by counsel for du Pont.

I now wish to offer in evidence Plaintiff's Exhibit E-2, the same being on page 9.

Mr. WHITNEY. I just would like to call his Honor's attention to the provisions at the top of page 96, providing that du Pont takes nothing which does not relate primarily to or come within the scope of the activities regularly conducted by its pigment department. I don't think it is important. It is a rather minor point but I just wanted to comment on that in passing.

The COURT. Is there any comment by Mr. Webster?

Mr. WEBSTER. No, your Honor.

Mr. DIXON. Do I understand that Exhibit E-2 is in evidence?

373 (Plaintiff's Exhibit E-2 for identification received in evidence.)

Mr. DIXON. This exhibit, your Honor, is on page 98 of the printed record, as we indicated, and is one where National Lead assumes the obligations of the contract of January 1, 1933, between Titanium Pigment Company and Krebs; in other words, it is comparable to the Exhibit E-1, wherein du Pont did the same thing as regards to the business of Krebs. The parties to that agreement are du Pont, Titanium Pigment Company and National Lead.

Mr. WEBSTER. Du Pont is not a party.

Mr. DIXON. I believe that is in E-2.

Mr. WEBSTER. I have an agreement in front of me which is an indenture made the 31st day of October.

The COURT. That is not the language that was called to my attention.

Mr. DIXON. We had better get it straight.

The COURT. The language is here, "Agreement entered into this 31st day of October, 1936," and the parties named are du Pont, Titanium Pigment, or TP, and National Lead or NL.

Mr. WEBSTER. All right. Is there a mistake in the original document received in evidence? The official copy marked E-2 is apparently the one I referred to as an indenture to which only the Titanium Pigment Company and National Lead are parties.

374 Mr. DIXON. It should be corrected if that be the case.

The COURT. Do you have the original of E-2 that you have in mind?

Mr. DIXON. Yes, your Honor. It would appear that there was a mistake in the introduction of that exhibit. We have here a copy.

The COURT. Will you offer the correct one.

Mr. DIXON. Yes. We will now offer it, and we will withdraw the other exhibit, that is, Exhibit E-2, and we will now offer a new one.

The COURT. First we will mark E-2 in evidence.

(Plaintiff's Exhibit E-2 for identification received in evidence.)

The COURT. Now will you offer the correct one and have that marked Exhibit E-2.

Mr. DIXON. I now offer Plaintiff's Exhibit E-2 in evi-

dence, the same being an agreement between du Pont, Titanium Pigment Company, Inc., and National Lead Company, dated October 31, 1936.

Mr. WEBSTER. No objection.

(Marked Plaintiff's Exhibit E-2.)

The COURT. Now I will instruct the clerk to strike out the endorsement E-2 on the incorrect one.

375 Now, Mr. Dixon, do you want a new number assigned to that incorrectly marked document?

Mr. DIXON. No, your Honor.

The COURT. Then you will return that to counsel.

Mr. DIXON. We now offer in evidence Plaintiff's Exhibit E-3, the same being an agreement dated January 1, 1941, between National Lead Company and du Pont de Nemours & Company, which is on page 112 of the printed copy.

(Plaintiff's Exhibit E-3 for identification received in evidence.)

The COURT. Is there any comment on that?

Mr. DIXON. Yes, your Honor. This was an amendment to the 1933 agreement, our Exhibit E, in which two things appear to have been done. The Licensed Field was extended to include extender pigments and exchange of know-how was disposed of between the parties.

The COURT. What do you mean by disposed of?

Mr. DIXON. Eliminated so far as the contract was concerned. In other words, there was a provision, as we pointed out previously in our Exhibit E, between the parties for an exchange of know-how, and that does not appear in this amendment to the contract of 1933, or the amendment to Exhibit E.

The COURT. Let me be clear on that. This, in form, is an amendment or is it a substituted agreement?

376 Mr. DIXON. It was called an amendment to the 1933 agreement.

The COURT. Is the know-how clause stricken out or is there a simple new agreement which does not contain it?

Mr. WEBSTER. Your Honor will find that is at the head of Article I of the agreement—the tenor of it.

Mr. WHITNEY. It is Article III, your Honor, page 112 of the printed copy.

The COURT. All right.

Mr. WHITNEY. Mr. Dixon, a minor correction on the first point. The first point was that it was not thought that it was clarified to include extended pigments, as they

were in the original agreement. It was clarified to include extenders.

The COURT. I am glad you corrected me because I made a wrong note of it. In fact, as I remember, the expert who testified said there are no such things as extended pigments. There are only composite pigments and there are extenders.

Mr. DIXON. That is correct.

The COURT. And the application of the extender converts the product into a composite pigment.

Mr. DIXON. In the trade, your Honor, the confusion arises from this, that an extended pigment is
377 also a composite pigment, and an extender is the matter that they use with the TiO_2 to make an extended or composite pigment.

The COURT. Are there any comments other than that, Mr. Whitney?

Mr. WHITNEY. No, your Honor.

The COURT. Mr. Webster?

Mr. WEBSTER. No.

Mr. DIXON. We now wish to offer in evidence Plaintiff's Exhibit F for identification, which appears on page 119 of the printed record, the same being an agreement of cooperation dated February 16, 1933, between Imperial Chemical Industries, Ltd., that is ICI, and Imperial Smelting Corporation, Ltd., which is ISC, and Goodlass Wall and Lead Industries, Ltd., which is GW, and Titan Company, Inc., which is Tinc.

The COURT. Dated what?

Mr. DIXON. The date of that agreement is February 16, 1933, your Honor.

Mr. WEBSTER. I object to the exhibit as involving parties who are not present, and whose interests are being materially and injuriously affected if the action is to cancel the contract, and second, that the agreement does not appear to have any material or direct effect on
American Foreign commerce.

378 The COURT. Those are all the objections of the same character that you have already made yesterday in another connection, and which I overruled then and I will overrule them now.

Mr. WHITNEY. Our continuing objection should be recognized here. I make no such objection to the E group as we do to the others.

The COURT. Objections overruled and Exhibit F is received.

(Plaintiff's Exhibit F for identification received in evidence.)

Mr. WEBSTER. I would like to ask Mr. Dixon, and I have had in mind asking him in court rather than outside, when the original was offered, did you intend to offer the marginal notes?

Mr. DIXON. Oh, no, indeed, your Honor.

Mr. WEBSTER. They appear on the original exhibit—

The COURT. It has been reprinted in that form.

Mr. DIXON. They have been reprinted but I think it should be removed from the context.

The COURT. You are not offering the marginal notes?

Mr. DIXON. Absolutely not, your Honor, just offering the contract. If they appear in the exhibit or the
379 printed copy of the exhibit, they should be stricken.

The COURT. Does anybody else want to offer them? (No response.) All right.

Mr. DIXON. Perhaps I could defer comment on this, your Honor, until I complete the full series of these agreements.

The COURT. Why, of course.

Mr. DIXON. We now offer Plaintiff's Exhibit F-1 for identification in evidence, the same being shown on page 129 of the printed record, and being a license agreement dated March 10, 1933, between Titan Company, Inc. and British Titan Products Company Limited, that is BTP.

Mr. WEBSTER. The same objection, your Honor.

Mr. WHITNEY. I do not take any objection at this time other than the continuing one.

The COURT. Objection overruled. I will take it.

(Plaintiff's Exhibit F-1 for identification received in evidence.)

Mr. DIXON. We wish to offer in evidence Plaintiff's Exhibit F-2, being on page 149 of the printed record and being license agreement dated March 10, 1933, between ICI, ISC, GW and BTP.

The COURT. The same objections?

Mr. WEBSTER. I make the same objection and the additional objection that it is an agreement between
380 British parties only.

The COURT. Objection overruled, and Exhibit F-2 is received in evidence.

(Plaintiff's Exhibit F-2 for identification received in evidence.)

Mr. DIXON. We now offer Plaintiff's Exhibit F-3 on

page 154 of the record, same being an agreement dated March 10, 1933, between BTP and Tinc.

Mr. WEBSTER. The same objection.

The COURT. Overruled. It will be received in evidence. (Plaintiff's Exhibit F-3 for identification received in evidence.)

Mr. DIXON. We now offer in evidence Plaintiff's Exhibit F-4 on page 156 of the printed record, the same being an agreement dated March 10, 1933, between Tinc and BTP.

Mr. WEBSTER. I make the same objection with this notation, that it too only affects British parties.

The COURT. The objection is overruled.

(Plaintiff's Exhibit F-4 for identification received in evidence.)

Mr. DIXON. We are now offering in evidence Plaintiff's Exhibit F-5, which is on page 163 of the printed record, being an agreement dated March 10, 1933, 381 between BTP and R. W. Greeff, Ltd.

Mr. WEBSTER. I object on the further ground that it appears to be an agreement in the nature of an agency agreement whereby the British companies—

The COURT. I have not heard that name Greeff mentioned before except once in the opening. How is that material?

Mr. DIXON. That is the agent appointed by the British Company in the territory and in the discussion of these exhibits I will show the relevancy of that contract.

The COURT. All right, it will be received.

(Plaintiff's Exhibit F-5 for identification received in evidence.)

Mr. DIXON. We offer Plaintiff's Exhibit F-6 in evidence, being on page 168, and being an agreement dated March 10, 1933, between Tinc and BTP.

Mr. WEBSTER. I make the same objection.

The COURT. Objection overruled. Plaintiff's Exhibit F-6 will be marked in evidence.

(Plaintiff's Exhibit F-6 for identification received in evidence.)

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit F-7 for identification, same being an agreement dated February 17, 1939, between Titan Company, Inc., 382 or Tinc, and BTP. That is on page 171 of the printed record, your Honor.

Mr. WEBSTER. The same objection.

The COURT. Overruled. I will take it.

(Plaintiff's Exhibit F-7 for identification received in evidence.)

Mr. DIXON. There is one more exhibit in this series which we will offer, not now, but we will proceed to offer it at a later date.

I have already pointed out that prior to the execution of Exhibit F, that the Titan Company, Inc., or Tinc, had taken from Titan A/S and had allocated from its territory that which was the rest of the world, exclusive of that given or allocated to Titanium Pigment Company; the first thereof to Societe Industrielle under Exhibit B, and to the German company under Exhibit C.

The territory covered by these agreements relates to the British Empire, exclusive of Canadian territory and Newfoundland, and that portion of the territory adjacent to North America which could be included in a broad definition of the British Empire.

Now in this agreement which I am now referring to, Exhibit F, which was between the companies shown on chart No. 4, ISC, ICI and GW, those companies agreed with Tinc to form a new company, or to engage in
383 by taking shares and having an interest in BTP, which was given the exclusive right to manufacture and sell titanium and its compounds throughout the allocated territory under this agreement, which was, as I previously suggested, all of the British Empire, excluding, however, Canada, Newfoundland, the islands adjoining, and North America. Now all of the parties under this agreement, Exhibit F, namely, the ISC, the ICI and GW, were to purchase their requirements of titanium pigment from this new company, BTP, and to take steps—

Mr. WEBSTER. Will you now refer to the paragraph in the same way you did to the pages?

Mr. DIXON. I have not had a chance to read the record of it. It starts in the early part of the agreement. It is paragraph 1 of the agreement, your Honor. It is contained in paragraph 1, in answer to Mr. Webster's question.

(Continuing) To require their subsidiaries as set out to do likewise. This Tinc and this new company, BTP, are to enter into a license agreement, and the other companies are likewise to enter into license agreements with BTP covering the licensed field, and Tinc is to transfer to this new company all of its business in the British Isles. The capital structure is then provided for in the agree-

ment, and in this company, it has been pointed
384 out, the Titan Company owned a 49 per cent interest.

And provisions were contained in this agreement to the effect that no party to it could dispose of their interests without the consent of all the parties to the agreement.

Now under this contract, as I have indicated, we appended these other exhibits which I will now briefly discuss.

Exhibit F-1, the license agreement dated March 10, 1933, between Tinc and BTP, in Article 1 the licensed field is defined; also North and South America as to finished articles to the territory of BTP and Tinc and other allied companies; in other words, it is clearly shown what territories have been allocated at that time under the other agreements and what territories are covered by this agreement.

Under Article II, Tinc grants an exclusive license to the new British company for its territory on all patents, processed and subject matter within the licensed field, which Tinc had at the time of the agreement or might thereafter acquire.

BTP is granted the right to make sublicenses, providing the sublicensee agrees to conform to the terms of the agreement between BTP and Tinc. In other words, that
385 is the provision appearing in the previous agreements that we have referred to before.

Now BTP is not to make any sales of finished articles and so forth outside of its territory under Article II, so that the provisions of Article VI of the 1920 agreement may be enforced.

In Article III BTP grants an exclusive license to Tinc for its territory on all patents then owned or which it might thereafter acquire, on which BTP would have a right under the patents, and those rights are to be made available to Tinc or anyone that may be designated within the territories thus allocated to BTP. And then if BTP grants any license in Tinc territory the titanium compounds, if any, which are used shall be purchased from the company that is the allied company in whose territory the license is granted.

386 And BTP further agrees to grant exclusive licenses directly to any of the allied companies on the request of Tinc on any patents in the territory of Tinc.

Then follows Article IV which provides that neither of

the parties shall knowingly permit customers to sell any of the products within the Licensed Field within the territory of the other party and shall take such steps as may be necessary to make certain that this obligation is observed by their customers. If, however, such sales are made they shall be made through the company as exclusive agent in whose territory the sales are made by BTP. In other words, each party is the exclusive agent of the other for the sales of the other party in the other's territory. And BTP then appoints Titanium Pigment Company its exclusive agent for North America for any sales made in North America under the provisions of Article VI(c) of the 1920 agreement. Here again the sale can only be made in North America with the consent of Tinc. The agent is of course empowered, as in the previous agreements, to fix its own prices where such sales are made and conditions for the resale of the products within the Licensed Field, and each party undertakes again to prevent its customers from competing with the other in the other's territory

387 in the sale of finished articles permitted under this agreement.

Now in Article V we have the procedure for exchanging patent applications between the parties which is found in the German agreements, Exhibit C and that series, and Societe Industrielle agreements, Exhibit B. The exclusive licenses in Article VI are conditioned upon the payment of royalties by BTP as well as the performance of the other conditions, including the assumption by BTP of the obligations of Article IV of the 1920 contract, Exhibit A.

In Article VII both parties, that is Tinc and BTP, are to exchange accurate technical information or know-how, and permission is granted each party to inspect each other's plants for that purpose. Then follows the provision regarding the assignment of inventions of employees.

Then in Article IX each party agrees it will endeavor to provide to the other party as it may secure in its territory any inventions from other persons within the Licensed Field and make them available to the other party.

Then follows a provision in Article X with regard to the exclusive licenses remaining in force for the longest period

for which the respective parties have power to grant

388 licenses, but those exclusive licenses shall terminate in the event Tinc shall cease to own at least 25 per cent of a portion of the capital stock of this company. South America is made open territory for Tinc and TP, that is Titanium Pigment Company, and reference is made to them in this contract. Either party may then grant

sub-licenses as long as its exclusive license is in effect, provided the sub-licensee agrees to render statements of its production twice a year to the licensor and agrees to grant the licensor exclusive licenses on patents within the Licensed Field which the sub-licensee may acquire, and to assume the various obligations imposed upon the respective parties as to sales, products, agents and patents which we have previously discussed.

Exhibit F-2 on page 149, dated March 10, 1933, is one between ICI, ISC, GW and BTP.

The COURT. You are not reading the correct exhibit. You said F-2?

Mr. DIXON. F-2.

The COURT. F-2 is an agreement between BTP and—it doesn't say who the others are, it is blank. It looks like a form of agreement rather than an agreement.

Mr. DIXON. This is apparently all that was printed. It is a complete agreement.

The COURT. That is what you told me, that it is 389 between ICI, ISC, GW and BTP. That is what you told me when it was introduced in evidence.

Mr. DIXON. That is what it was. And here again we may have to resort to our stipulation to get the proper exhibit in evidence.

The COURT. It may be that the parties you have mentioned were inserted in the blank space.

Mr. DIXON. Well, that is the fact, your Honor, as I understand it, but the blank here won't help you very much in coming to that conclusion. We will therefore have to ask counsel for the defendants to state what the fact is with respect to that particular agreement.

Mr. WEBSTER. I understand, Mr. Dixon's statement is substantially correct.

The COURT. May I write into that exhibit the words mentioned?

Mr. WEBSTER. I don't know whether they actually had all of those parties in the one agreement.

The COURT. No. I mean the parties.

Mr. WEBSTER. Or whether an agreement in this form was executed by each of the British parties to BTP.

Well, I think that this can be cleared up by simply stating that it was provided in the British agreement, the main British agreement, that scheduled agreement No. 2

would be executed by ICI, ISC and Goodlass and 390 that such agreement was executed.

The COURT. Is that stipulated?

Mr. WHITNEY. Yes, your Honor.

The COURT. Very well. It is stipulated that Plaintiff's Exhibit F-2 where the word "grantor" is used that the grantor included ICI, ISC and GW and that such agreements were executed.

Mr. WEBSTER. I may just say that the fact is for the record that there were separate agreements executed by each of these parties in separate form.

The COURT. I understand. Three separate incidents in each of which one of these parties was the grantor.

Mr. WEBSTER. That is right.

Mr. DIXON. So that the record may be clear, then, I understand that Exhibit F-2 is a license agreement between ICI, ISC, GW and BTP; those companies, that is, exclusive of BTP—I withdraw that, your Honor.

The COURT. In each one of these agreements the grantor party was ICI in one, ISC in the second case and GW in the third, and that in each of those agreements BTP was the party grantee.

Mr. DIXON. That is right.

The COURT. So we will take that as fact.

Mr. DIXON. So that we will not have to offer separate exhibits.

391 The COURT. No.

Mr. DIXON. That was the only thought I had in mind.

Well, this exhibit covers the granting of patents, exclusive licenses by the parties to the BTP which they then owned or might thereafter acquire, and provides that when it files any patent applications relating to the Licensed Field copies thereof will be sent to BTP within two months from the date of the filing of the application, and that within a period of four months thereafter BTP will notify the company who sends in the application whether it desires the company who sends in the application to file similar applications in the territories outside of the territory of the BTP. In other words, making available to the allied companies outside of the territory of BTP such inventions as may be developed within the Licensed Field by this company.

The COURT. There was no cross-agreement in this contract whereby BTP assumed any obligation to do the same thing on its patents or future patents?

Mr. DIXON. That is right, because this company was to be the exclusive media of operations of the other companies.

The COURT. Yes. I just want to be clear. By this

392 agreement BTP did not agree to license ICI, ISC and GW with patents in the Field which it might own or acquire, is that correct?

Mr. DIXON. That is correct.

The COURT. You notice also that on page 153 of the print it appears that the ICI agreement was slightly different from the agreement of the other parties.

Mr. DIXON. That is right. There is a slight difference in the definition of the Licensed Field. I believe anything relating to the manufacture of tetrachloride was excluded.

The COURT. All right.

Mr. DIXON. Now Exhibit F-3, the agreement between BTP and Tinc, provided for the transfer to BTP of the business of Tinc within the British Isles. In other words, up to that time Tinc had been operating independently and had a business there and it was now transferred over to the new company, and this is the agreement effecting the transfer.

Exhibit F-4 between Tinc and BTP, Tinc sold its titanium products to BTP and turned over to it all the current contracts for the sale of titanium products and—

The COURT. In the field reserved to BTP?

Mr. DIXON. That is right.

393 The COURT. Turning over its inventory and contract.

Mr. DIXON. That is right. And continued to take such other steps as might be necessary to vest the benefit of its business in the new company BTP.

Now, Exhibit F-5 is one between BTP and the RW Greeff & Company, Ltd., and Greeff prior to that time had been acting as an agent for Tinc in this territory and BTP—

The COURT. Is that conceded, or do you want to prove it?

Mr. DIXON. I don't think it is in dispute.

The COURT. The question is whether you concede or stipulate that Greeff used to be the agent of Tinc before Tinc sold its British business to BTP.

Mr. WEBSTER. Well, that is conceded, yes.

The COURT. That is conceded?

Mr. WHITNEY. Yes, your Honor.

The COURT. You are willing to take Mr. Webster's concession as your own?

Mr. WHITNEY. Yes, sir.

The COURT. Very well, then. We don't have to bother proving it. All right, go ahead.

Mr. DIXON. And in this contract, the agent, Greeff & Company, obligates itself not to sell titanium products for export outside of the territory allocated to Tinc, nor to enter into any contract for the delivery of more than 50 tons of Titan products to any customer without imposing the above export restriction, with the right to cancel any future delivery to the customer in the event such restriction is breached by the customer. And no customer is to export in manufactured form any Titan products to the North American Continent.

In Exhibit F-6, another agreement dated March 10, 1933 between Tinc and BTP, Tinc agrees to supply BTP with titanium products for a specified period.

The COURT. So that it can get under production; is that the idea?

Mr. DIXON. That is right, your Honor. This arrangement is to be effected on a cost plus 10% basis, and BTP is to cooperate with TG to the extent of supplying TG, the German operating company, with additional capital if necessary to expand its plant on such terms as may be agreed upon between TG and BTP.

Exhibit F-7 is merely an extension of the Licensed Field effected on February 17, 1939, or that approximate date, on all of the contracts with the allied companies, and this exhibit effects that extension in the Licensed Field as far as BTP is concerned.

The COURT. That is the last of the F series, isn't it?

Mr. DIXON. I have one more exhibit, your Honor.

395 The COURT. You haven't offered it yet.

Mr. DIXON. I haven't offered it yet.

The COURT. Before you do that, I observe that some of the F series of contracts do not in their exhibit form appear to have been executed. Is it stipulated that they were signed by the parties named?

Mr. WEBSTER. Yes, it is so stipulated.

The COURT. Mr. Whitney?

Mr. WHITNEY. Yes, sir.

The COURT. Very well.

Mr. DIXON. That is correct, your Honor. We have been using these copies and that is the reason, unfortunately, the copy which you have seen and which has gone in evidence is not the executed one.

The COURT. I understand that, but I want to save time or avoid the contingency of having at the last day of the trial somebody come in with a lot of proof about execution.

Mr. WEBSTER. Your Honor need not have any fear of that, sir.

The COURT. Very well.

Mr. DIXON. Thank you, your Honor. I think that is helpful to all counsel if we have these understandings with reference to these matters as we go along.

The COURT. Now you say you want to offer another F exhibit?

396 Mr. DIXON. Well, we will offer it in this series as soon as it is available.

Mr. REA. Just a minute. That document was not subpoenaed. We have not had a chance to look at it, but we will look at it over the noon recess and make a statement about it right after the noon recess.

The COURT. All right.

Mr. DIXON. That is correct, your Honor.

The COURT. He hasn't got it so you can't offer it.

Mr. DIXON. So we will defer that until we secure it.

The COURT. Any other comment you want to make on the F series?

Mr. DIXON. That is all on this series.

The COURT. Mr. Webster.

Mr. WEBSTER. Your Honor, there are several provisions of the contracts or at least one of the contracts that I would like to call attention to and make some further comment about them.

Your Honor will note on page 152 that it is provided that the share—

397 The COURT. That comes out of F-2.

Mr. WEBSTER. F, I believe, your Honor.

The COURT. Page 152 is not F-2.

Mr. WEBSTER. The printed copy did not show F-2 that I had been using before. It provides for reorganizing the share capital of BTP which had been nominal up to that time, and provides that it shall be—

The COURT. I don't find that in the page you refer to.

Mr. WEBSTER. Excuse me, it is page 122. It is Exhibit F.

Mr. WEBSTER. It provides that the share capital of BTP shall be increased to £150,000, consisting of 25,000 A shares of £1 each, which shall be issued for cash, and 125,000 B shares of £1 each which shall be issued as fully paid up to Tine, or Titan, Inc., as consideration for the transfer by Titan, Inc. to BTP of the existing British business of that company.

Now on the next page, 123, the distribution of shares among these companies is shown, that is, the then distribution of shares. That is 49 per cent to Titan, Inc.,

17 per cent to ICI, 17 per cent to ISC and 17 per cent to GW.

The COURT. That is on the A shares.

Mr. WEBSTER. That is on the A shares.

398 The COURT. That is paid up shares.

Mr. WEBSTER. That is the shares that were distributed for cash. It then provides in paragraph 6, on page 123,

"Except in so far as is otherwise herein provided during the continuance of this Agreement no party hereto shall transfer or part with the possession of any of its shares in British Titan except with the written consent of all the other parties".

Then on page 125—I am taking these as they appear in order—

The COURT. Are we getting into an Addison case? Is that what you are giving me? Are we getting into the doctrine of the sale of a business accompanied by restrictions?

Mr. WEBSTER. No.

The COURT. All right. I did not mean to interrupt you.

Mr. WEBSTER. Then it also provides for the articles of association of British Titan, and I will come to my point in a minute, which provided that "on any sale of 'A' shares the same shall first be offered to the other holders of 'A' shares and that if acceptances are received in respect of more shares than are offered the shares
399 offered shall be transferred to the other holders proportionately."

Then in paragraph 12 it provided that

"Until British Titan has commenced to manufacture titanium compounds and for two years thereafter Titanic will arrange for the supply of titanium compounds manufactured by Titangesellschaft Leverkusen."

Now getting back a moment to this question of shares, at the foot of this page, 126, it provides that

"Any party" retiring under that provision shall offer to the remaining parties the right to purchase the whole of the A shares in BTP then held at a price to be determined by agreement and corresponding to the book value of the shares.

The COURT. Without the consideration of patents, trademarks.

Mr. WEBSTER. That is correct; or good will. On page 127 there is a provision to the effect that should the agree-

ment of 1920 referred to in the third recital to this Agreement cease or determine prior to the expiration of thirty years, each party shall have the right to retire from the provisions of this agreement by giving to the other parties certain notice, and it then says that "Such retiring party or parties shall have similar obligations to those contained in the last preceding clause of this agreement."

400 And by reference back to paragraph 13, that is the provision with reference to the retiring party receiving a price corresponding to book value without taking into account the values of patents, trade marks or good will.

Now I would like to refer back first to the statement which your Honor permitted me to submit as part of the opening statement and which I did not then take the time to reread, and I would like to now read a portion of that, on page 92 of the transcript.

The COURT. You don't want that taken down again, do you?

Mr. WEBSTER. No, I don't think there is any need to take it down again.

(Mr. Webster reads from page 92 and following of the transcript.)

The COURT. That is the end of your statement that you were reading.

Mr. WEBSTER. That is the end of the statement which is incorporated in the record in full.

Now if the Court please, I have here and would like, if the Court permits, to read into the record as part of the same statement, a copy of the contract which the British parties and the National Lead Company have agreed that they would execute.

The COURT. They have not executed it yet?

Mr. WEBSTER. It has not been executed.

401 The COURT. I should imagine that the more orderly procedure would be for that to go in on the defendants' case. I assume that it is a matter of defense.

Mr. WEBSTER. Well, I of course am quite content to accept that order of proof.

The COURT. Unless you indicate to me some good reason why convenience would be served for putting it in at this time.

Mr. WEBSTER. Well, I had been led to offer to put it in now for two reasons. First, I wanted to make good on the commitment which I made in October—

The COURT. That you have done already.

Mr. WEBSTER. That I would offer it as soon as possible. And the second is that I thought in connection with the comments that have been made by Mr. Dixon it might be helpful to the Court to have before it now the provisions of the agreement which are really material, namely, those that the parties propose to follow in the future.

The COURT. There will be a dispute about that.

Mr. WEBSTER. I don't care particularly. It is just a question of whether or not it would assist your Honor in understanding the case. This is the sort of case in which there is no particular reason for putting on blinders
402 and saying we are not going to look at what the defendant Lead Company is going to do until we reach it. This is the present status of the relations between the American and British parties, and I believe that it may be helpful.

The COURT. I will tell you one thing, first what you are tendering is a piece of writing which you as counsel tell me certain people are going to adopt as an agreement, so that in present form it would not be receivable in evidence. If not receivable in evidence, simply as a comment, I don't know whether it will be helpful. In any event, is there objection to the course suggested by Mr. Webster, Mr. Dixon?

Mr. DIXON. On behalf of the Government, it seems to me that it can serve no useful purpose at this time, and we therefore do object to it.

The COURT. All right. Mr. Whitney?

Mr. WHITNEY. No comment except only to say, your Honor—

The COURT. Is there objection to the suggestion made by Mr. Webster?

Mr. WHITNEY. I have no objection either way.

The COURT. All right. I won't let it in.

Mr. WHITNEY. Except that we are not participating in these negotiations he has been talking about, though they are interesting to me to hear.

403 The COURT. In view of the objection I will not receive the form of proposed agreement between the British company and the National Lead Company which Mr. Webster has already tendered.

Are there any other comments you wish to make on the F series?

Mr. WHITNEY. No, your Honor.

Mr. WEBSTER. In accepting your Honor's ruling, I think I should simply add that of course it is our inten-

tion before this case is over to secure your Honor's approval if possible to the terms of agreement which as I say have been accepted by the parties, the British and American parties.

The COURT. I don't follow that request. You mean you want me to give you an approval of the agreement? I don't follow you.

Mr. WEBSTER. Well, I think that the time may well come in this case when your Honor, after first considering whether or not the Government has proved its case of a violation of law, and then if there has in any case been any violation of law with reference to the National Lead Company—and I am not involving my friends here in this statement in any way—if it is felt that the 1920 agreement or those provisions of the 1920 agreement which were carried over into the British agreement are
404 objectionable, then we shall offer this.

Now I am doing what I know to be a somewhat unusual thing with reference to the 1920 agreement; there are provisions in the 1920 agreement which if made today would not be made by the National Lead Company and there are certain respects in which that agreement has never been enforced. There are other respects in which the agreement has not proved to be appropriate, and if we were free to do so, contractually free to do so, without danger of liability or suits for damages or suits on the contracts in other countries, we would frankly cancel the 1920 agreement.

We have undertaken in good faith and with a good deal of diligence to work out with reference to the British just what our relation should be consistent with the Sherman Act, what we regard to be the provisions of the Sherman Act. We have done that in the case of the British and in the case of the Canadians, not in the case of the others because we think the German agreement and the French agreement and the Japanese agreement are out the window by reason of the war.

The COURT. Well, I have no doubt that before this case is finished in one form or another, these proposed agreements will go into this record, but I do not think that over objection I can receive them now. So we
405 will move on from there.

Is there any comment by you, Mr. Whitney, on the F series?

Mr. WHITNEY. The only thing on that, your Honor, is that I would like to reserve the point that if these new

agreements come into evidence and your Honor does conceive that you have the power to pass upon them—

The COURT. You mean the new agreements?

Mr. WHITNEY. Yes.

The COURT. They are not in evidence now and you need not comment on those. Do you want to comment on the F series?

Mr. WHITNEY. I beg your pardon, your Honor. I misunderstood. No comment. Thank you.

Mr. DIXON. If the Court please, at this time I wish to have marked the correct copy of Exhibit E-2, and to withdraw the one that was incorrectly marked E-2.

The COURT. That was taken care of.

Mr. DIXON. It was taken care of, your Honor, but the official court exhibits as such still is wrong until the number is put on the right exhibit.

The COURT. I thought we did that this morning. We made one correction this morning. What page is that in?

Mr. DIXON. Exhibit E-2, your Honor, is on page 406 98, and in corrected form the way it should be in the printed record, but the exhibit which was made the official exhibit was incorrect. We now wish to have the correct one marked correctly.

The COURT. Off the record.

(Colloquy off the record.)

The COURT. The paper the clerk is about to mark is the correct paper. I understand that the form in which it is printed is correct. Strike out the incorrect labelling.

We will now take the luncheon recess.

(Recess until 2:15)

Mr. DIXON. We would like to offer in evidence Plaintiff's Exhibit F-8 for identification, same being a letter from C. J. Stopford to Dr. Jebsen, dated September 13, 1944, to which is attached a two-page copy of a letter from P. T. Minter, secretary of BTP addressed to National Titanium Pigments, Ltd., copy of said letter being dated September 11, 1941.

The COURT. That is a new company. I have not heard that before.

Mr. DIXON. That is right. That is Laporte, your Honor, for your information.

Mr. WEBSTER. This is objected to as irrelevant. It is a letter from a person connected with BTP to Dr. —Jebsen,

apparently advising Dr. Jebsen that pursuant to Government regulation in September, 1941, an arrangement has been made between BTP and another British company, National Titanium Pigment Company. It is outside of the issues in the case. There is nothing to show what Dr. Jebsen had to do with this, and it seems to me it relates to a situation that is exclusively British and under the war.

The COURT. First, have you any question as to the authenticity of the document?

Mr. WEBSTER. No, none whatever.

The COURT. In other words, it is admitted that 408 Minter is the secretary of the British Titanium Products, Ltd?

Mr. WEBSTER. I am advised that he is, and I do not raise any question about that.

The COURT. Nor as to his authority to write that letter for British Titanium Products, Ltd?

Mr. WEBSTER. Mr. Minter did not write the letter for the British company.

The COURT. I am looking at the annex. The most important part of this exhibit is the annex to that letter. The letter itself contains no information. It is the enclosure which fits in with the general information and exhibits that have heretofore been received relating to intercompany arrangements.

Mr. WEBSTER. I do not know anything about Mr. Minter's authority to represent the latter.

The COURT. If that is not conceded I will consider the objection. The objection has been taken and the objection is sustained. Have it marked for identification.

(Marked Plaintiff's Exhibit F-3 for identification.)

Mr. DIXON. I understand then, your Honor, that the objection of the defendant is made on the ground that the party whose signature purports to be attached to the letter for British Titan Products Company, Ltd., as secretary is questioned?

409 The COURT. Well, I take it not his signature but his authority to speak for the BTP with respect to the matter of which he speaks. When you say it is questioned, it is clearly not conceded, and therefore that raises the necessity of proving it.

Mr. DIXON. Very well. Then I will reserve it at this time, your Honor.

We now wish to offer in evidence Plaintiff's Exhibit G, found on page 173 of the printed record, being an

agreement between TG and Aussig, dated November 23rd, and December 2, 1933, respectively.

The COURT. Are there any objections?

Mr. WEBSTER. I will state the objection: The agreement is clearly an agreement between the German and Czechoslovakian companies. It relates to quotas within Europe, within the territory that is referred to as the TG territory. It has to do with an obligations, apparently on the part of TG, to supply Aussig, the Czechoslovak company, with certain products, and it is immaterial and irrelevant.

The COURT. Mr. Whitney?

Mr. WHITNEY. Just the continuing objection.

The COURT. The objections are overruled.

(Plaintiff's Exhibit G for identification received in evidence.)

410 Mr. DIXON. This is the agreement referred to on chart No. 3 as the Aussig agreement. It was entered into between co-conspirator TG and co-conspirator Aussig. The territory involved in this agreement is described or mentioned in the block between TG and Aussig on chart No. 3. In this agreement both parties to the agreement give each other the right to use their patents and agree to support each other in protecting those patents during the period of the contract, and Aussig assumes the obligation of acquiring from TG the titanium dioxide which Aussig requires for the territories covered by the agreement in so far as those requirements exceed the production capacity of Aussig at the time the agreement is concluded. And TG agrees to supply Aussig for such requirements and at a preferential price.

The COURT. I understand Aussig is not to produce any more than it is already producing, is that the idea?

Mr. DIXON. If it sells more than the quota allocated to it and is unable to produce from its factory, then it has to take that production from TG.

The COURT. You have two ideas there and I am not clear: You say if it produces in excess of its quota and in excess of its productive capacity—both. In other

411 words I want to be clear which it is that it has to buy from TG, the excess of its then production capacity or the excess of the production capacity it may have at the time of the purchase, or excess of some specified quota?

Mr. DIXON. It is the excess of the then production capacity.

The COURT. In other words, it cannot increase its production capacity as at the time of the making of the agreement?

Mr. DIXON. Correct.

The COURT. And all additional requirements must come from TG?

Mr. DIXON. Correct.

Mr. WEBSTER. That is subject, I believe, to a clarification: just in the interest of clarity that when TG's capacity has been absorbed Aussig may then go ahead and put in its own manufacturing facilities.

Mr. DIXON. The description of the territory covered has already been referred to and the field of the agreement was the same as had already been pointed out as that shown on chart No. 3. Now both parties to this agreement are to do everything possible to prevent the importation of titanium products by third parties into the territory of this agreement. The quota is set up

between the two parties as being for Germany about
412 28 per cent as against 72 per cent allocated to TG.

The COURT. What is the quota? Quota of what?

Mr. DIXON. 100 per cent. In other words of the amount that is sold within Germany as part of the territory. Of that 100 per cent Aussig is entitled to sell 28 per cent.

The COURT. In Germany?

Mr. DIXON. In Germany and TG is entitled to sell 72 per cent.

All sales activities within Germany are to be carried on by IG for both parties at prices to be fixed by mutual action; I mean action of both parties.

Now Aussig is to be the predominating influence in Czechoslovakia for the determination of prices and other matters within Czechoslovakia. That is other matters relating to price.

The COURT. Does TG sell any of its products in Czechoslovakia?

Mr. DIXON. Yes.

The COURT. Directly or only as Aussig requires it?

Mr. DIXON. It may sell within Czechoslovakia but under the agreement the consideration has to be given to Aussig in fixing the prices in Czechoslovakia where Aussig has a factory and was operating at the time.

413 The prices in the rest of the territory are to be fixed by agreement of the parties, so that there will be no loss on any sales to either seller. In other words, it was a matter of agreeing between themselves on

the price which should govern for the territories, apart from Czechoslovakia and Germany, which have been both covered by the specific considerations I have already mentioned.

The consent of the other party to the agreement was made an absolute condition. I mean the consent of the party to any change of price was made an absolute condition to the agreement, and at the end of the year each party is to advise the other as to the names of firms to which deliveries are being made, and a trustee is appointed to examine the books of both parties once a year to determine whether or not the agreements have been complied with.

Now both parties to the agreement, together with IG are not allowed to participate with any other factory which manufactures, or intends to manufacture, titanium in the territory covered by the agreement, or to aid such factory in any way by giving technical or commercial advice or information.

Employees of both companies are to be bound by this obligation by the respective parties to the contract.

Then each party to the agreement is given the
414 right to use the respective patents of the other party. It is not a direct license of particular patents, but it is a general arrangement that either party may use the respective patents of the other, and each party agrees to refrain from filing oppositions to the grant of applications for patents filed by the other party during the term of the agreement.

The termination provision of the agreement provides that the agreement runs until December 31, 1936, although the expiration date is automatically extended to December 31, 1939, in the event these parties get along all right under the agreement and can work out any problems for the exchange of information of a commercial nature relating to sales of those products. If no cancellation notice is given within six months period prior to the expiration date, then the agreement runs for another two years. In other words, it is a self-perpetuating agreement, unless either party notifies the other of its intention to cancel that agreement, limited under the agreement for an additional two-year period.

And if competition develops during the continuation of the agreement between Aussig and TG on the one hand and any other third party, then TG and Aussig are to do everything possible to make the outsider's activities

ineffective. In other words, it is not competition
415 between TG and Aussig, but competition between
someone else who is not a party to this agreement
which is then regarded as being competition against both
of them and concerning which both parties will do every-
thing in their power to make that competition ineffective.

Mr. WEBSTER: I have no comment.

The COURT. Mr. Whitney?

Mr. WHITNEY. No comments.

Mr. DIXON: We now offer in evidence plaintiff's Ex-
hibit G-1 for identification, same being described as con-
tract 4 between Titan Company, Inc., or Tinc. Thann &
Mulhouse, Terres Rares and Societe Industrielle. Your
Honor, here are the companies referred to in chart No. 3
(indicating) on chart. The group under Contracta &
Quatre Livraisons 34 and the territory involved in this
agreement is the territory shown on chart No. 3 in the
second block under the main heading "Territory Covered
By Agreement."

The COURT. What is the exact date of it?

Mr. DIXON. The exact date of this agreement, your
Honor, is June 5th and 17th, 1935. It is found at page
188 of the printed record.

Mr. WEBSTER. I have not stated my objection.

The COURT. Is there objection?

Mr. WEBSTER. There is objection on the grounds
416 heretofore stated with reference to the previous
agreements; also I would like to ask Mr. Nixon if
he has pointed out to the Court that the agreement was
terminated in the fall of 1939.

The COURT. He has not come to that yet.

Mr. WEBSTER. I believe he did say something about
one of these agreements being terminated either today or
yesterday and I thought that might appear.

The COURT. That would not govern admissibility. Of
course one of the parties to this agreement is Titan
Company, Inc.

Mr. DIXON. That is right.

The COURT. Objection overruled. Mr. Whitney, have
you any objection?

Mr. WHITNEY. I wonder if I may have just a moment.
I notice the name "Krebs" in here.

The COURT. But he is not a party to this.

Mr. WHITNEY. But I am amazed to see something about
an agreement with Krebs. There is no such agreement.
I would like to look at it a moment. This came in after

we began today, your Honor.

The COURT. All right.

Mr. WHITNEY. Only the continuing objection, your Honor.

The COURT. Do you say this was represented by
417 the second line on chart No. 3?

Mr. DIXON. Yes, your Honor. The reason that date is on there is because that is the date the quotas would become effective.

The COURT. But this agreement is signed in 1935.

Mr. DIXON. That is right, but it was, for all practical purposes, in operation in 1934 as will appear from the agreement.

The COURT. Objection overruled.

(Plaintiff's Exhibit G-1 for identification received in evidence.)

Mr. DIXON. In this agreement the Blumenfeld group, as in the other one, that is Exhibit G, and the Titan companies, for the purpose of insuring sales on common lines and avoiding competition between themselves, and to aid in preventing competition from others outside of the parties to the agreement, entered into this contract. Connected with it will be Exhibit G-2 which I will not take time to discuss at the moment, except to refer to it as it is not yet in evidence and is not particularly an important part of these two agreements. But the territory here was principally France, Belgium and Holland, together with some of the smaller countries in the immediate area.

418 Now I direct your Honor's attention to the first part of this agreement on page 189, where reference is made to the rights of Societe Industrielle, Titan Company, Inc. TG, and BTP, those being the three co-conspirators and the defendant Titan Company, Inc. or Tinc, and what we have called the Blumenfeld companies. Terres Rares, Societe Anonima Titanium, which your Honor will recall is Montecatini, and this Krebs Pigment & Color Corporation referred to as being holder of United States patents of the Blumenfeld group, and Aussig, which is the other party which we discussed in the so-called Aussig agreement. The exclusive nature of the territories of each of those companies is referred to and is a part of this agreement.

Now in this agreement the French territory was divided as to sales of pigments on substantially an equal basis; that is, on a 50-50 basis. But in the rest of the territory covered by that agreement the Titan Companies were given

70 per cent of the market as against 30 per cent to the Blumenfeld companies.

The terms of delivery of any product sold is to be fixed by mutual consent, and in the event quantities are delivered above the quotas set for either party, compensation in cash or merchandise shall be paid to the other party on a stipulated basis.

419 Quarterly reports are to be submitted and each party on deliveries and prices by the other parties and the books of both parties are to be open to the other party to determine compliance with the agreement.

Now both parties are prevented from participating in competitive enterprises, or to assist them in any way by furnishing technical or commercial advice or preferential deliveries or licenses. The same obligations are imposed upon the employees of the companies to the agreement.

Now on the patent provisions both parties are given the right to use the patents of the other royalty-free, during the term of the agreement. In other words, this is not giving a license of specific patents but in general a right to use any patents the other party may have royalty free, during the term of the agreement, and if any such licenses are granted to customers by either party, the customer must obligate itself to use the products supplied by the parties to the agreement.

Then follows a provision agreeing to refrain from filing oppositions to patent applications filed by either party.

This agreement as to term can be denounced on a six-
420 months' notice prior to December 31, 1938, and if

no notice is received it continues to run for a period of two years thereafter unless denounced within a six months' period prior to the expiration date of each two-year period. In other words, it is another agreement that is self-perpetuating unless one of the parties acts to cancel.

Mr. WEBSTER. I understood Mr. Dixon conceded this was terminated by agreement in 1939, but I do not believe we got that on the record.

The COURT. Is it stipulated that this agreement was terminated in 1939?

Mr. WEBSTER. By agreement.

Mr. DIXON. We have found no official notice, I believe, that this agreement was actually terminated. There was a note appended to it that by reason of the operation of the war it was supposed to have been somehow suspended.

Mr. WEBSTER. The note said it was terminated by agreement and you accepted the document with the note attached to it.

The COURT. Was that annexed to Exhibit G-1?

Mr. DIXON. They are talking about this, your Honor (exhibiting paper), which certainly I would not regard as an official notice that it has been terminated.

The COURT. Is that in evidence?

Mr. DIXON. It is not in evidence.

421 The COURT. I have no knowledge that it has been terminated unless it is conceded or proved.

Mr. WEBSTER. It can be proved it was attached to the copy given to Mr. Dixon's representative, and I believe he knows it to be true.

The COURT. I hear no concession, so I won't make any such assumption now.

Any comments, Mr. Webster?

Mr. WEBSTER. I have no comments.

Mr. WHITNEY. If your Honor please, not to delay the trial, may I ask if your Honor would reserve to me the right to renew an objection on the ground of competence. I will explain why: As I said to your Honor this contract, like all these contracts we are just seeing for the first time, this particular one at page 190 was handed to us at the opening of court this morning, and we are actually looking at it for the first time. As we turned the pages we observe that the setup is that it begins with a recital that there exists certain pre-existing agreements. That is at page 189, and then there is another recital in the middle of the page, and toward the bottom of page 190 is a recital that between Terres Rares and Thann & Mulhouse "agreements exist concerning a technical and commercial cooperation regarding the products of the
422 present contract according to which the industrial and commercial activities are reserved." And then on the next page:

"(b) Societe de Produits Chimiques des Terres Rares which has exclusive rights for all countries with the exception of the rights specified under (a) and the rights resulting from the agreements made with:"
and then:

"Krebs Pigment & Colour Corporation".

Now, your Honor, I am instructed that there does not and never has, exist any contract whatsoever between Terres Rares and Krebs Pigment & Colour Corporation. In other words I am instructed that Terres Rares has here made what looks like a misrepresentation to the effect that it had a contract with us, and if your Honor eventually denied my motion to strike you would have

here in the record a statement by Terres Rares that they have an agreement with us.

The COURT. That is right, and if it should appear Terres Rares were a co-conspirator that was a declaration—

Mr. WHITNEY. Then I ask leave, although five minutes have gone by, to object to this on the ground of competence. It is hearsay and it is not authenticated.

The COURT. Are you objecting on the ground that 423 the signatures have not been proved and that this is not the original, and so forth—that type of competence?—

Mr. WHITNEY. Yes, your Honor, just so. You see my only protection is to cross-examine somebody who has told what I am instructed is a falsehood. That is the only protection against that type of thing.

The COURT. There being an objection on the ground of competence with respect to Exhibit G-1, on the part of du Pont—

Mr. DIXON. I would like to be heard on that, if your Honor please.

The COURT. All right, I will hear you.

Mr. DIXON. As I understand, the question now presented to the Court is we have here a document the authenticity of which is not questioned by the defendants National Lead and Titan Company, Inc. It has been so stipulated.

The COURT. Correct.

Mr. DIXON. We have the objection of one of the defendants to the admission of that document as against the defendant objecting, on the ground of competency, the objection being, as I understand it, that he does not know that the document is authentic and wants proof of the signatures appearing thereon, and, I presume, the authority of the person signing it.

424 Now in connection with this question, your Honor, which may arise, perhaps, in regard to other documents as well, I wish to direct your Honor's attention to the ruling of the Court in 52 Fed. Supp., 751, a case entitled United States v. Vehicular Parking Ltd., in which the effect of a stipulation by one defendant,—and here we have an admission as to the authenticity of documents,—was objected to as not having any effect whatever on the other defendant in the case. In other words, he claimed that he was entitled to question the matter, and so therefore was not bound by the stipulation or admission, if you

want to call it that, of the other defendant. The Court said that the action of the other defendant in stipulating and admitting the genuineness of the document was, until proved to be without foundation by the other defendant, presumed to be sufficient to attach validity and authenticity to the document.

The COURT. In other words, what I said day before yesterday.

Mr. DIXON. Correct, your Honor. But if the defendant objecting feels that he has some reasonable grounds to contest it he still has that right and privilege of doing so. That is a decision by Judge Leahy in the Vehicular Parking Company case in Delaware.

425 Now we feel where one defendant admits the genuineness of his own document—not mine; he is not questioning them—certainly in the interest of saving time, of expediting the trial, it would seem that that should be sufficient to make a prima facie showing of the authenticity of that document until proved otherwise. But the burden should be upon the party who asserts to challenge the document on the assumption that he has something to challenge it on.

The COURT. He is not simply putting you to the burden of proof?

Mr. DIXON. That is right, your Honor.

The COURT. I want to see if I can safeguard Mr. Whitney's claim that if he is so bound he has not an opportunity to cross-examine. Let us see what might happen: Assume that the Government undertakes to prove this. I assume all it would have to do would be to produce someone who can testify that the document was in fact executed. That might be a stenographer in the office of one of those companies or one of its law officers, and that it was delivered. Assuming that such witness was produced; that the objection as to authenticity would no longer lie, and Mr. Whitney would still be without the power of cross-examining anybody as to the truth of the alle-
426 gations declared in the contract, and in that respect would be no different than the testimony of any other declaration by a co-conspirator. But of course your bigger problem would go back to your question as to whether a connection has been established between du Pont and the other co-conspirator. If there is no connection then of course this contract would not be admissible against du Pont no matter how authentic, and that is your general objection that I have been saving.

Mr. WHITNEY. I think your Honor has analyzed it rightly and that perhaps undermines the point I was making. Your Honor is well aware of the fact that I have to work very fast here, and I am grateful to your Honor for correcting us.

The COURT. That is along the line I was discussing the other day.

Mr. WHITNEY. I think you are right.

The COURT. And as a practical matter, while I think what I was suggesting was not suggested as a rule of law I thought that it was a sensible rule of convenience. I did not know that somebody had actually crystallized it into a holding because that sanctifies it in some way more than by just mere legal opinion, but it seems to me the balance of convenience lies here in overruling the objection especially since I take it that your objection to authenticity

is not because you are really questioning the authenticity of the signature, but simply because you want an opportunity to cross-examine with respect to the verity of the declarations in the agreement. I think that that would not be accomplished by sustaining your objection, and if you want to challenge those declarations you will have to (A) either produce evidence to contradict it, or, (B) establish the absence of any conspiratorial relationship between the two parties, in which case the document would go out as far as your client is concerned.

Objection overruled.

Mr. WHITNEY. If your Honor please, with great respect to Judge Leahy, who is not here to defend himself, I do think that he has slipped into an error so fundamental that it might be possible to establish the birth of fascism in this country on that opinion. He says that if the Government elects to indict any two or more people or bring action against them, and any one or more of those people—any one of them—chooses to cede away the defendant's defenses that have been built up in eight centuries of the common law, the laws of evidence are gone as far as the other defendants are concerned. Now that is error. That is plain error.

The COURT. I certainly do not have to subscribe to that for the purposes of making this particular ruling.

Mr. WHITNEY. Your Honor will observe the fundamental error.

The COURT. The way you state it it seems to be pretty extreme.

Mr. WHITNEY. I do not think he realized it, but that is what that opinion says.

Now here is this situation: We have here received within the last 24 hours from the Government upwards of 300 printed pages of documents from all over the continent of Europe; most voluminous. We have been trying desperately to read them from our laps as your Honor does as we go along, and they contain here and there, and that is what we spotted, reference directly to us. Now I just again am trying to put the matter in perspective and I would say it is the sort of thing I had supposed used to happen in Russia and in Germany; that you bring a defendant into a courtroom to be sued by the Government and then press upon him a mass of documents that he has never heard of and with which he has no connection and say, "Oh, Comrade So-and-So says you had a connection with it."

429 The COURT. By using the word "comrade" you do not mean the Russian citizen but you mean the comrade in arms?

Mr. WHITNEY. No. I mean the Russian Government, your Honor. It is against that sort of thing that battles were waged in this country over 150 years ago and in England 500 years ago, and there is no fairness where hundreds of pages of documents are traded in against one defendant because another one says it is so.

Your Honor has accepted everything subject to connection and a motion to strike out so I have no quarrel with your Honor's action, but I am saying these things by way of comment because what it does come down to, your Honor, it goes to the probability of connection. You see here we have, as I say, these hundreds of pages and our name turns up about once every 100 pages, laying aside the E documents. In other words, in the documents in connection with which we have objected reaching up to page 191, this is the fourth time in 191 pages that our name has appeared at all. That is an average of one for every 50, and we have no connection with any of the contracts and therefore what I am really submitting is that I recognize that the rightness, in cold law of your Honor's ruling, because we all know, especially those have been district attorneys, as I have been, the dangers of the law of conspiracy; that it is a real sheltering law
430 for misuse and the only protection of the alleged co-conspirator is in this rule that he must be connected.

Now in these big complicated antitrust cases the question is connection, but what the Government must seek to connect us to is this mass of contracts—whatever it be, this mass of contracts represents in the way of a combination—and that we were a part of it and my only comment is that the negative of that is it is established by the rarity of these highly dubious references.

The COURT. All right. I have ruled.

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit G-2, the same being contract between Societe Industrielle, Terres Rares, Thann and Tinc dated June 5 and 17, 1935, found on page 212 of the printed record. This agreement may be called the delivery contract.

Mr. WEBSTER. I object to it on the grounds as stated before and call the Court's attention to the fact that the copy which has been offered in evidence was given to the Government by the Lead Company with the advice and notation that the contract was terminated by agreement in 1939. Of course it was terminated by other factors but that has already been stated.

The COURT. Yes.

Mr. WHITNEY. The continuing objection.

The COURT. Objection overruled. It will be received as Exhibit G-2.

13P (Plaintiff's Exhibit G-2 for identification received in evidence.)

Mr. DIXON. The only comment I care to make about this contract, which is really a supplemental contract to contract 4, Exhibit G-1, is that goods delivered pursuant to this contract, which provides the method of delivery under G-1, contract No. 4, shall not be exported from countries for which they have been ordered and delivered and the buyer will have to impose upon its customer the obligation that, not to export or sell such goods for export and the buyer shall reserve the right to cancel the quantities remaining to be delivered under such contracts in case the customer violates the obligations; and he particularly will see to it that any export to America north of the Panama Canal is avoided. I make special reference to that because of course that is the territory of the United States where the defendants are doing business.

The COURT. Is there any further comment, Mr. Webster?

Mr. WEBSTER. No comment.

Mr. WHITNEY. No comment.

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit

G-3, the same being agreement No. 6 shown on chart No. 3 (indicating) between Tinc, Societe Industrielle and TG; those companies being the allied companies operating under the Jebesen-Rossie Barton patents, so-called, for purposes of convenience, and Terres Rares, Thann & Mulhouse and Montecatini, those companies being the Blumenfeld patent assignees or licensees. The territories covered by this agreement are set forth in the third block—

The COURT. You are referring to Exhibit G-3?

Mr. DIXON. Yes, your Honor.

The COURT. I am sorry. I have not received it.

Mr. WEBSTER. I assumed I would have an opportunity to object. I make the same objection and point out that in this contract Mr. Dixon already stated in his opening that it had been terminated by agreement.

The COURT. All right. Mr. Whitney?

Mr. WHITNEY. Your Honor, I would like to leave with your Honor overnight this further thought; that it is something of the same sort your Honor called to my attention this morning when I suggested that perhaps it could be taken to be in evidence as represented in the Krebs-Titanium agreement Exhibit E.

Now the two points that one has observed in these two agreements of this afternoon are representations by one of the parties to the agreement. What the Government does is simply to introduce the agreement in evidence as an agreement. I take it what becomes evidence against anyone who is connected with a conspiracy is the fact that that agreement was made. That is all the Government has proved. The fact that in spite of that agreement one of the parties represents some external fact would not itself be in furtherance of the conspiracy which the Government maintains the execution of the agreement represents. I don't think those external facts, as they are represented are evidence as such.

The COURT. Unless they constitute declaratory admissions by one conspirator as against another conspirator under the law of evidence relating to conspiracy. I understand the rule is pretty clear. Now it is true that any declaration in that agreement which is self-serving as to an external fact, the Government would not be bound by it for the reason that it is not bound by self-serving declarations. So any declarations in there which are in the nature of an admission I think the Government can take advantage of. I may be in error about that. I am

just formulating it as you are handing it to me. I should like to hear you explain it, but that is the way it strikes me. So that if there should be proof of an agreement and the agreement contains preambles of fact if they are admissible as admissions they constitute proof. If they are not admissible as admissions then there is no proof of the occurrence of the events recited.

Mr. WHITNEY. I do understand, your Honor, that the rule is that any declaration in furtherance of
434 a conspiracy is admissible against co-conspirators, but that an admission, as such, by one of the alleged conspirators is not admissible against the co-conspirators. In other words, the rule of admissibility—

The COURT. Let me see if I can restate it slightly differently. I understand you cannot use a declaration to establish a conspiracy.

Mr. WHITNEY. That is a different rule.

The COURT. But once the conspiracy is established the declarations, in the nature of admissions as to the conduct of conspirators deemed to be in furtherance of the conspiracy are admissible.

Mr. WHITNEY. My understanding was to the contrary, your Honor, but I won't worry your Honor's time now. I have a memorandum here and I will look at it, and I looked at it moment after rising and I believe the distinction is made that even after the connection has been made and the conspiracy established, still all that is admissible are the declarations in furtherance of the object of the conspiracy.

The COURT. Assuming your statement to be true, I would presume when two conspirators contract, and in that contract they recite some preambulatory material which is the foundation of that agreement that they regarded those preambles as being in furtherance of their
435 conspiracy. Otherwise they would not put it into the preamble of their contract.

Mr. WHITNEY. It may well be, your Honor.

The COURT. It may be that we do not have to decide these rather acute questions.

Mr. WHITNEY. Passing the comment again, I think this is exactly the same as the other. It has occurred to me in the interim that I am, as Mr. Webster said the other day, setting up a straw man again, because the representation here is only that Terres Rares had a contract with Krebs, with no description or definition of the contract whatsoever—

The COURT. It does not prove very much.

Mr. WHITNEY. It does not prove, in my respectful view, anything as to the conspiracy, because a conspirator might have all sorts of contracts with a tailor or what not.

The COURT. It would prove as a minimum fact that they knew each other.

Mr. WHITNEY. Yes, thank you, your Honor.

The COURT. All right, Plaintiff's Exhibit G-3 will be received.

(Plaintiff's Exhibit G-3 for identification received in evidence.)

The COURT. I am giving you gentlemen considerable leeway in the argument at this time because it seems to me that if we ventilate some of the problems early in
436 the game we will move along faster.

Mr. WEBSTER. I think it is very helpful because these questions are going to arise in more critical form.

The COURT. Yes, and I reserve the right to reverse myself.

Do you want to comment any further on G-3?

Mr. DIXON. Yes. I started my comment apparently a little out of order.

The parties to this agreement obligated themselves to refrain from selling or delivering titanium products in favor of the parties who have the exclusive rights in a specified territory reserved to them and referred to in the contract.

The parties further agree to prevent the importation by third parties of titanium products which they must sell in the countries which they had obligated themselves not to export or sell into, and in the event there should be any such sales or imports the quota of the party referred to, in other words who was connected with the sale, shall be reduced for its respective territory by the amount of such sale or importation.

Now in this establishment of the quotas the so-called Blumenfeld group were allocated 30 per cent of the market and the Titan companies the other 70 per cent.

Mr. WEBSTER. He says Blumenfeld 30 and
437 Titangesellschaft 70?

Mr. DIXON. That is right. The sales price of titanium products are to be fixed and are fixed by the agreement and the parties to the agreement are prohibited from participating in or aiding any competitive enterprise. In other words, any company that might in would be confronted with this agreement in this territory.

The parties to the agreement further agree not to supply intermediate products to third parties who are likely to utilize them for the manufacture of products covered by the agreement, and the agreement is to be a secret agreement between the six parties to the contract.

The COURT. Which agreement?

Mr. DIXON. This one, G-2, as far as any third party or person is concerned or person who isn't a party to this agreement is concerned it does not exist.

The patent rights are exchanged between the parties for the duration of the contract on a royalty-free basis. In other words, here again there is no out and out license specific patents. It is permissive use of patents without any royalty being charged as long as they belong to the parties to the contract.

This agreement can be denounced on six months' notice prior to December 31, 1938 and if notice is not given the agreement runs for two-year periods unless within a two-year period six months' notice of cancellation is given.

The quota system established here, as in contract 4, is to be effective as of May 1, 1934. In other words, although this contract was actually executed, you might say, over a year later it was effective from that date on.

Now this contract, as we stated in the complaint, is alleged to be terminated, or to have been terminated, on December 31, 1938 by action taken by Montecatini, the other party to the contract which we referred to here before in our opening statement, and that party is sometimes referred to in this contract as Bovisa, in case your Honor reads the contract further, but that is the same party.

The COURT. Would the renunciation by one party terminate the contract as to all parties?

Mr. DIXON. That is right.

The COURT. Is there anything you desire to add, Mr. Webster?

Mr. WEBSTER. No, your Honor.

Mr. WHITNEY. No, your Honor, but would your Honor like to have me give you a note of a case I have here. There are quite a number of them but I think your Honor will be interested in this one. It is from the Second Circuit Court of Appeals, United States vs. Goodman, 129

F. (2d) 1009. The Court says:

To be admissible against others than the declarants, the declaration must not only be made while

the conspiracy is pending but must also be 'in furtherance of its object.' Einhorn's statements that Goodman had been his partner in the bankrupt's business were not made to procure goods or money for this corporation. They were merely narrative declarations of a past fact."

Perhaps that supports us both you observe.

The COURT. Yes.

Mr. WHITNEY. And another case in our own circuit, if you are interested, is Van Ripper v. United States, 13 F. (2d) 961 at page 967. I have a large number of cases but those are two in our own circuit.

The COURT. I think the principle as you stated it from the C.C.A. Second Circuit decision corresponds with my recollection of the law. I did not intend to state it otherwise. If I did I would adjust it to that statement.

Mr. DIXON. I now wish to offer in evidence Plaintiff's Exhibit H on page 251 of the printed record being a cross-license agreement between Titanium Pigment Company, Inc. and American Zirconium Corporation, dated May 6, 1935. That is the agreement which will also be found on chart No. 4.

Mr. WEBSTER. No objection.

Mr. WHITNEY. Only the continuing objection.

440

The COURT. The objection is overruled.

(Plaintiff's Exhibit H for identification received in evidence.)

Mr. DIXON. Before discussing this agreement, your Honor, I will offer Plaintiff's Exhibit H-1 for identification, the same being agreement dated May 6, 1935 between Titanium Pigment Company, Inc. and American Zirconium Corporation, the Glidden Company, the Metal & Thermit Corporation. That is on page 263 of the printed record, your Honor.

Mr. WEBSTER. No objection.

Mr. WHITNEY. Only the continuing objection.

The COURT. Exhibit H-1 will be received.

(Plaintiff's Exhibit H-1 for identification received in evidence.)

Mr. DIXON. I wish to offer Plaintiff's Exhibit H-2 in evidence, being found on page 268 of the printed record, and being an agreement dated May 6, 1935, between National Lead Company, Titanium Pigment Company, Glidden and Metal & Thermit Corporation.

The COURT. The same disposition?

Mr. WEBSTER. No objection.

Mr. WHITNEY. The continuing objection.

THE COURT. It will be received.

(Plaintiff's Exhibit H-2 for identification received in evidence.)

441 Mr. Dixon: These three exhibits, your Honor, Exhibits H, H-1 and H-2 relate to the license granted one of the American companies producing titanium pigments in the United States by the National Lead Company acting through, at the time the agreement was made, a subsidiary, Titanium Pigment Company. It is a cross-license agreement between Titanium Pigment Company and American Zirconium Corporation wherein Titanium Pigment Company, that is the National Lead subsidiary, grants a non-exclusive license to American Zirconium Corporation of approximately 38 patents owned by Titanium Pigment Company and an additional 31 patents of which it is the exclusive assignee, and American Zirconium Corporation grants Titanium non-exclusive licenses on 8 patents owned by American Zirconium Corporation.

The Licensed Field described in this contract is substantially the same as in the 1920 contract covering all methods, processes and apparatus within the field of manufacture and use of all titanium compounds containing 2 per cent or more of titanium which can be used as pigments.

The finished article as defined in this contract is, any artificially produced article or compound, within the Licensed Field manufactured by the aid of any process or apparatus.

442 Now in this license American Zirconium Corporation is restricted in the use of the license to the United States, and it is further provided that the American Zirconium Corporation shall not, directly or indirectly, sell or export for sale any product within the Licensed Field outside of the United States. In other words, we have here the export restrictions imposed upon a licensee of the defendant, National Lead, acting through its subsidiary.

Then the American Zirconium Corporation grants to Titanium Pigment Company a license to any patents which American Zirconium Corporation may secure during the term of the agreement in addition to those which are specifically licensed to Titanium Pigment at the time the agreement is made. Zirconium is then obligated to render periodic reports of its production to Titanium Pigment Company, at least twice a year.

The validity of the patents of each party is acknowledged, and then comes an exchange of know-how between

the Titanium Pigment Company and American Zirconium Corporation.

There is this apparent limitation of itself in the contract; that this is subject to any obligations which might prevent it from giving or passing on to American Zirconium Corporation that technical know-how or information.

443 Then we have the employee restrictions which we have seen before.

Then American Zirconium Corporation agrees to grant exclusive licenses throughout the world to any companies or associates of Titanium Pigment Company that might be requested by Titanium Pigment Company. In other words, that applies to any future patents that American Zirconium Corporation could secure. They are to be made available to any—

The COURT. Does it say foreign associates or associate?

Mr. DIXON. The language had perhaps better be referred to.

Mr. WEBSTER. At the top of page 258.

Mr. DIXON. It is entirely within the control of Titanium Pigment Company as to who should get the foreign licenses of American Zirconium.

The COURT. It is not limited to foreign, is it?

Mr. DIXON. It is limited to Titanium Pigment Company exclusive licenses throughout all countries of the world, to Titanium Pigment Company or any of Titanium Pigment Company's licensees. And any person or associate specified by Titanium Pigment Company is to have exclusive license. In other words, the purpose apparently, of this provision was to make available to any foreign associate of Titanium Pigment Company, which would

444 be the companies connected with the contract I have mentioned, any patents that those companies might want to use in their respective territories.

The COURT. Not du Pont?

Mr. DIXON. There is not anything said here.

The COURT. You keep telling me "foreign" or "abroad" or language of that kind which I think excludes du Pont. I want to know whether you intend to exclude du Pont.

Mr. DIXON. No, your Honor. A memorandum as to licenses and the obligation of Zirconium to make available licenses to the foreign associate would obviously have nothing to do about it. Throughout the countries of the world other than the United States of America. That seems to be the limitation imposed by that language.

445 The COURT. I just wanted to know what you claim.
Mr. DIXON. Then American Zirconium appoints Titanium Pigment Company or any of its licensees specified by Titanium Pigment Company the exclusive and sole agent of Zirconium for the sale of all products, that is, manufactured by American Zirconium Corporation within the Licensed Field outside of the United States.

The COURT. That is a protective device.

Mr. DIXON. That is right. And the prices and terms and conditions are to be fixed by Titanium Pigment or whoever it designates to act as agent for such sale. And then Zirconium agrees not to make any sale or transfer of any of its products outside of the United States except through Titanium Pigment as its exclusive agent. This is perhaps subject to the privilege that if American Zirconium cares to export outside of the United States it can do so provided the amount of titanium pigment is less than two per cent and provided it does not interfere with the sales of any of the parties that we have previously referred to in the respective exclusive territories.

The COURT. I think we will suspend, now.

(Short recess.)

Mr. DIXON. Commenting on Exhibit H-1, this merely is a contract guaranteeing the maintenance of stock
446 ownership in American Zirconium Corporation by the parties to that contract.

Exhibit H-2 is the contract whereby the parties guarantee the performance of the contract between the subsidiary companies. In other words, that is comparable to the Exhibits A-1 and A-2 in the 1920 agreement.

Mr. WEBSTER. If the Court please, I have no comment with reference to the Zirconium agreements except that I think that I should advise the Court that on the 9th of March, 1944, all of the Zirconium agreements that have been referred to were terminated.

The COURT. By their terms or by the parties?

Mr. WEBSTER. By the parties, by agreement.

Mr. WHITNEY. If your Honor please, these again are agreements that we have never seen, so far as I know, in which we are very much interested in view of the allegation that the Krebs and National licenses were worked out together. But looking at it here this afternoon I observe a few features that I would like to call to your Honor's attention.

The COURT. What page?

Mr. WHITNEY. Beginning at page 251 on Exhibit H and underlining Mr. Dixon's comments. From the beginning

I do observe that in a general way it falls within his pattern of conception. It follows generally speaking the National Lead language, and thereby contrasts with the 1933 du Pont agreement, Exhibit E. For example, the Licensed Field, the finished article, pages 254 and 255, and then at the middle of page 255, in II, seven lines from the bottom, Mr. Dixon emphasized this phrase in respect of the grant by Titanium to Zirconium: "provided always, however, that the license so granted shall not permit Zirconium to sell or export for sale, directly or indirectly, outside of the United States of America"—well, that is the type of thing that he referred to as commercial, and I am mentioning it because I expect your Honor will be keen to see whether it turns up in our Zirconium license when that comes to be shown, having regard to the allegation of the Government that we in National Lead worked them out together.

And III is the reciprocal grant back from Zirconium to Titanium.

IV and V I do not need to linger over, they are all interesting, because they are all in the old form, so-called pattern.

VI provides for an exchange of know-how. I do observe that the language of it is different from the language of ours. That is to say, ours is already in evidence.

448 VII is their favorite provision about employees of the licensed parties which was not present in ours.

VIII is the one that he gave particular emphasis to, page 258:

"Zirconium agrees to grant to Titanium and/or any licensee or sublicensee of Titanium . . . an exclusive right and license, exclusive of all others including Zirconium, throughout all countries of the world other than the United States of America"—and skipping down four or five lines:

"whether or not patented or patentable, now owned or controlled by Zirconium or hereafter; and during the term of this agreement made, discovered or acquired by it."

Now your Honor pointed out that this ran to foreign parties, to the benefit of foreign parties only, but I would supplement your Honor's remark by pointing out that it covers the type of patents upon which Mr. Dixon places so much emphasis in our grant, that is, future patents, and goes way beyond our grant in two vital respects. First, "whether or not patented or patentable," and secondly, that it is exclusive. And I am going to ask the Government

here and now to consider how they can possibly justify themselves before their oath of office in having joined us as a defendant and co-conspirator and not joined Zirconium. This agreement, by their definition, your Honor, is far worse than ours. Why are we brought in here and Zirconium not?

The COURT. That is argument to be addressed to a jury. I never heard it addressed to a court.

Mr. WHITNEY. It is argument to the 130 million people who are invited to buy Mr. Berge's book.

Now we resume with IX at the bottom of page 258; and he gave emphasis to this:

"Zirconium shall and hereby does constitute and appoint and shall hereafter continuously retain Titanium or any licensee or sublicensee of Titanium"—that is, all the foreign associates—

"to the exclusion of all others, as the sole agent of Zirconium throughout the term of this agreement for the introduction and sale outside of the United States of America, its territories and dependencies, of all products of Zirconium within the Licensed Field,"—that is, whether or not patented—"upon such orders of said agent therefor" and so on.

And then he read to you, in line 9,

"at prices and upon terms and conditions to be fixed by said agent"—and then they rub it in—

"and Zirconium shall not make any sale or transfer of any of its said products in or for any territory outside of the United States of America, its territories and dependencies, except through its said exclusive agent and as aforesaid."

The COURT. I think you ought to move over to the front table.

Mr. WHITNEY. I should say so. Your Honor, I want to tell you that my associates and I, in all fairness, are aghast. We never saw this. Here is a genuine agreement on the pattern of 1920 and here is a defendant that is not named as a co-conspirator, let alone a defendant. There is no such thing against us.

Now, if your Honor please, the rest of the agreement is very similar in terms to the past, but they are all minor provisions and I won't take up any further time on them.

The COURT. All right.

Mr. DIXON. We now offer in evidence Plaintiff's Exhibit I, on page 273 of the printed record, the same being an agreement between Krebs Pigment and Color Corporation

and American Zirconium Corporation, dated January 1, 1935.

The COURT. No objection. It will be received.

(Plaintiff's Exhibit I for identification received in evidence.)

Mr. DIXON. Now we wish to offer in evidence
451 Plaintiff's Exhibit I-1, the same being an assignment of contract made December 31, 1935, between Krebs Pigment and Color Corporation and du Pont de Nemours and Company.

Mr. WHITNEY. No objection.

The COURT. Without objection it will be received.

(Plaintiff's Exhibit I-1 for identification received in evidence.)

Mr. DIXON. Now this is the agreement between American Zirconium Corporation and Krebs Pigment and Color Corporation, now the defendant du Pont de Nemours and Company. In view of the comment by counsel for du Pont I will comment briefly that this is a non-exclusive license from Krebs to Zirconium of 37 patents to make titanium dioxide, and that American Zirconium is restricted in this contract by the defendant du Pont in the manufacture of titanium dioxide which Zirconium can manufacture by reason of this license to 3000 tons per year for the years 1935, 1936 and 1937, 6000 tons per year for the succeeding three years, and 9000 tons per year thereafter. The royalty is based upon not less than a quarter of a cent per pound on all titanium dioxide produced by American Zirconium during the period of the agreement.

Those are the important provisions that I wish to direct
to your Honor's attention. Zirconium admits
452 validity of the Krebs patents and agrees to mark any containers containing any products and so forth that are manufactured under the patents, and the contract is to run until all the letters patent attached to the license agreement have expired, provided that Zirconium may cancel it at any time after January 1, 1945 if the products then made do not infringe any of the patents licensed.

Mr. WHITNEY. If your Honor please, this contract of course in our view is to be contrasted with the earlier Exhibit H to see the critical differences, and thereby evidencing the independence on the part of the two licensors. Notably, as appears at the outset, this is a one-way license. Du Pont grants a license to American Zirconium and no rights come back to du Pont. There is a working cross-license. The consequence of that is that there is no know-

how exchange here as there is in others. That is the second point.

Then at page 274, under I(a) is our grant of a non-exclusive license and it is under specific patents. In other words, we give Zirconium the license it wants under the specific existing patents. That is quite different.

Then the quantity provision I discussed the other day. It is what I might call the Standard Oil of Indiana provision in the sense that perhaps we had better not
453 have had it in. I don't think there is anything illegal in it, under the Paper Bag case, but we always relax it, and we have abandoned it before the trial.

And in that connection I will ask your Honor to refer to Plaintiff's Exhibit 46, which contains the tonnage of actual production of Zirconium under the license and the royalties paid, and you will find that, roughly speaking, there was a gradual and steady increase of production of Zirconium, commencing with the year 1935, at then 2200 tons, and running up to the year 1941, at then 6500 tons, and from the very second year it exceeded the amounts in the contract. In other words, the contract was not enforced. There isn't any doubt but that at that time we considered we were entitled to enforce it. There isn't any doubt that under the Paper Bag case we are still entitled to enforce it. And when Zirconium asked in the '30s for more than the quantity, the record shows that du Pont argued with them, but du Pont always gave in in the end. And they went on steadily growing.

Now as a matter of fact, Exhibit 46 in evidence will show to your Honor that in 1942 their production practically ceased, and from October 1, 1942, to September 30, 1943, they reported no production at all. We don't know the reason. Presumably some war reason. So that they
454 have not been a sufferer because of this clause which has been abandoned. But it is one of those little items which is embarrassing, it is one of the sort of items that makes a case. It is the sort of reason we all have to be here to justify and explain, and we believe we have.

Then, your Honor, at the bottom of page 274, II, again characteristic of a license agreement, is the fact that it is a straight royalty agreement, which contrasts again with the National Lead license.

And again at III, where we give Zirconium a most favored nation clause, characteristic of the liberal type of license agreement, where we say if we license anyone

else they will have the same terms. Such clause does not exist in the National Lead agreement because that is essentially a partnership working agreement.

IV and V on validity and marking of the patented products are the usual clauses, but they are quite different in language again from the National Lead license.

VI is the cancellation clause and that is different in language and substance. The National Lead cancellation was 1951, with various other provisions around it, and this has nothing of that sort, but does have what I call

your Honor's attention to as being a most unusually
455 liberal provision, at the top of page 277, the effect

of which is that at any time after ten years Zirconium had an option of getting out of the license altogether. That is to say, they could by submitting to us information-evidentiary of the fact that they did not infringe, again become free in the sense that they could take their chances on whether we could sue them under the patent laws. And I confess that although I am exposed to a great many of these agreements, I have never before seen one with just that clause. It strikes me as extraordinarily liberal and one that would highly commend itself to even the most liberal views that have become current in our recent lifetime. And it, finally, is peculiar because that ten years comes to an end December 31st of this year. So that we are, really, if there is an argument here from the Government that this granting by us of a license to Zirconium under these forty-odd patents is some sort of a shopping restraint, it is one that Zirconium begins at its own free will to be free to escape beginning with the coming first of January. So perhaps we will find the Government not coming back after the first of the year, for which I would be very happy.

Finally, in paragraph VII, the provision is quite different. Under the National Lead agreement it was assignable to a successor of Zirconium, and this agreement
456 is not, this agreement being definitely a personal characteristic of the pure form of patent license contract.

Mr. Dixon. Might I add off the record, your Honor, that I presume that it would be rather easy to satisfy du Pont under this provision, that he says is so magnanimous, now that the suit is pending, that Zirconium does not infringe those patents, so graciously referred to as having been made available to American Zirconium Corporation.

Mr. WHITNEY. Now, Mr. Dixon quite misconceives that. It is on the record and ought to be on the record. With great respect to you, you quite misunderstand the provision, the provision that Zirconium has it in its hands to cancel if it makes available to Krebs all information evidentiary of such non-infringement. It does not have to satisfy Krebs. We cannot decide whether or not it may cancel. It makes the decision whether or not it is to cancel, and it then makes the position of any member of the public completely free of the provision of which the Government is making criticism. That is a vital distinction.

The COURT. Very well.

Mr. DIXON. We now wish to offer Plaintiff's Exhibit J in evidence, being found on page 281 of the printed form, the same being a pool agreement between 457 Titan Company, Inc., Societe de Produits Chimiques des Terres Rares, I.G., regarding the formation of a Japanese company and appointing Doitsu as trustee to make the necessary arrangements. That is dated January 18, 1936.

Mr. WEBSTER. I renew my objections that have been sufficiently stated before with reference to other foreign agreements.

Mr. WHITNEY. Just the continuing objection, your Honor.

The COURT. Well, Titan Company, Inc., is not a foreign company.

Mr. WEBSTER. Yes, Titan Company, Inc., is a party to the agreement now offered in evidence.

The COURT. Yes. I say that is not a foreign company.

Mr. WEBSTER. Oh, no, I did not say that.

The COURT. Oh, I thought you said that was an agreement amongst foreign companies. I must have misunderstood you.

Mr. WEBSTER. I meant my objection was on the same grounds as to other agreements including foreign companies to which Titan Company, Inc., was a party. There were some in which Titan, Inc., did not appear at all.

458 The COURT. I understand. Yours is a continuing one. Objection overruled. Plaintiff's Exhibit J received in evidence.

(Plaintiff's Exhibit J for identification received in evidence.)

Mr. DIXON. Before discussing these exhibits, your

Honor, I would like to offer the entire series of Japanese contracts.

The COURT. All right.

Mr. DIXON. We therefore offer Plaintiff's Exhibit J-1 in evidence, the same being Agreement B dated January 18, 1936, found on page 289 of the printed form, between Kokusan Kogyo and Doitsu for the formation of the Japanese company, Titan Kogyo.

The COURT. Any objection? The same objection, I suppose.

Mr. WEBSTER. The same objection.

The COURT. Objection overruled. Exhibit J-1 in evidence.

(Plaintiff's Exhibit J-1 for identification received in evidence.)

Mr. DIXON. I now offer Plaintiff's Exhibit J-2 in evidence, on page 294 of the printed record, being a guarantee agreement between Doitsu, Tinc, IG, TG, Terres Rares, and Thann & Mulhouse, dated January 18, 1936.

Mr. WEBSTER. The same objection.

459 The COURT. Overruled.

(Marked Plaintiff's Exhibit J-2 in evidence.)

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit J-3, found on page 307 of the printed record, the same being license agreement C between Kokusan Kogyo and Titan Kogyo.

Mr. WEBSTER. I think that one is subject to the further objection that it does not include Titan Company, Inc. or any other American company as a party. Otherwise, the objections are the same.

The COURT. This agreement is between KK and TK, dated January 18, 1936.

Mr. DIXON. That is right, your Honor.

The COURT. All right. I will allow it.

(Plaintiff's Exhibit J-3 for identification received in evidence.)

Mr. DIXON. January 6, 1936, is contained on the top of page 5 of Exhibit J-3.

The COURT. Was it made before J-1 and J-2?

Mr. DIXON. No, your Honor. Actually, this agreement would have to have been made after the main agreement.

The COURT. Probably contemporaneously.

Mr. DIXON. That is right. It may well have been provided for, in the Exhibit J, by which the purposes of that contract were carried out.

460 The COURT. J-3 is Chapter (c) of J, isn't it?

Mr. DIXON. That is right.

The COURT. All right.

Mr. DIXON. I now wish to offer in evidence Plaintiff's Exhibit J-4, the same being a license agreement labeled "D" between Doitsu as trustee for Tinc, IG and TG and Titan Kogyo, or TK.

Mr. WEBSTER. The same objection.

The COURT. No date?

Mr. DIXON. This, your Honor, is apparently June 1, 1936, to the best of my ability, and I am approximating the date.

The COURT. All right. Plaintiff's Exhibit J-4 received in evidence.

(Plaintiff's Exhibit J-4 for identification received in evidence.)

Mr. WEBSTER. There is nothing in the agreement to show the date.

The COURT. The date will be subject to proof if it is material.

Mr. DIXON. I now offer in evidence Plaintiff's Exhibit J-5, the same being minutes of agreement between TK and KK labeled "E" in a series of these Japanese agreements. Here again there is apparently no specific date given to the copy of the agreement offered, but approximately the same date as the other.

461 Mr. WEBSTER. The same objection.

The COURT. Exhibit J-5 is received in evidence.

(Plaintiff's Exhibit J-5 for identification received in evidence.)

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit J-6, the same being minutes of agreement labeled "F" between TK and KK. This agreement is on page 328, your Honor.

Mr. WEBSTER. The same objection.

The COURT. The same objection, the same disposition. It is received in evidence as Plaintiff's Exhibit J-6.

(Plaintiff's Exhibit J-6 for identification received in evidence.)

Mr. DIXON. We now direct your Honor's attention in discussing these Japanese contracts to chart No. 4 wherein these series of contracts are shown to the right under the European and the rest of the world territory division on that chart. We have seen the creation of TG and the territory allocated to TG at the time that agreement was entered into which was, among other portions of the world, Japan and China. This agreement was therefore under the supervision or control in the sense of territory of TG.

Therefore, the parties to the agreement operated through the agent Doitsu as trustee for all of the parties 462 to these agreements.

Now these agreements cover licenses from the Blumenfeld associates, Terres Rares and Thann & Mulhouse, as well as the interests of Tinc, and are shown on the chart by the various lines connecting these companies—Blumenfeld and Terres Rares running up to Doitsu and then from Doitsu to TK, and then on the other hand from TK to Doitsu and then through, also, Thann & Mulhouse being a party to this agreement is also connected with it.

The COURT. Any other comment?

Mr. DIXON. Yes. I wish to point out that Terres Rares was interested in the Japanese market at this time and had been exporting to that market and that these agreements therefore related to competition, the elimination of competition between those two groups in that market and retained all operations with regard to the titanium pigment business in the Japanese market, via the Japanese company. As I have already pointed out, there was a trustee appointed through which these contracts and agreements were made and all communications were to go through that party under Japanese law.

The allocation of stock interests in this company were varied in percentages. 50 per cent of the stock was allocated to the Japanese company who participated in the formation of this new company to manufacture titanium pigments, and the balance was allocated between the 463 Titan companies and associates on the one hand and the Blumenfeld groups, of which the Blumenfeld groups were to get I believe 30 per cent of the 50 per cent of the stock remaining to be distributed among the Blumenfeld group and the Titan group companies.

Now all of the parties to this agreement agreed to sell their stock if, as and when it was sold only in one block and not separately, so that the control of the company was to remain 50 per cent in the Blumenfeld-Tinc companies or interests and the other 50 per cent in the Japanese group.

Now J-1 is the agreement B dated January 18, 1936 and provides for the amount of capital with which the Japanese company shall commence business and the new company or the other Japanese company participating in the formation of this group agrees not to transfer any of its holdings of the Japanese company without the consent of Doitsu, the trustee. The company cannot be dissolved until December 31, 1960, and if it is not dissolved on that date it can

only be dissolved at the end of each succeeding ten-year period.

Plaintiff's Exhibit J-2 is the guarantee contract between Doitsu, Tinc, IG, TG, Terres Rares and Thann & Mulhouse in which they authorize the trustee to act for them in this agreement, and the Licensed Field is described as substantially the same as that in the 1920 agreement, and the territory of the Japanese company is limited to 464 Japan and Manchukuo. The definition of the finished article is substantially the same as in the 1920 contract.

The European-American group, which is the two groups, obligate themselves to refrain from granting any licenses in the Licensed Field to any other Japanese company than the one that is to be licensed. And Terres Rares and Thann & Mulhouse agree to make their patents and experience available to TK at any time TK desires. In other words, the technical know-how in patents of the Blumenfeld group were to be available to the Japanese company if they desired it. And TG agrees to transmit to this new company all information and technical experience that they have and which they get by reason of the connections of TG with the Titan Company. The Titan companies and the Blumenfeld companies agree not to sell any products within the Licensed Field in any territory of the Japanese company and to impose these same obligations upon their customers. That is the provision we have seen in the other Titan-Blumenfeld contract. And the Japanese company agrees to impose the same obligation upon their customers.

Then follows the provision we have seen before—customers of the group may, however, that is the European-American group, sell finished articles within the Japanese territory and the customers of the Japanese company 465 have the same rights, provided that such sales cannot be made in North America. That is a specific restriction there. The territory of North America is expressly set apart as one in which those sales cannot be made.

The parties agree to make certain that their customers do not compete in any undesirable way and if such competition develops the company whose customer is affecting the competition shall take steps to prevent its continuation.

And, then, the group, that is the American-European group, agrees not to participate in any other Japanese enterprise in which titanium pigments may be manufactured. Then KK is to agree on its own behalf and on behalf of firms belonging to the Japanese company not to

engage in the manufacture or trading in all products within the Licensed Field except through this Japanese company.

Now Exhibit J-3 is the license agreement "C" between KK and TK and follows the form that we have discussed before.

The COURT. I suggest that you suspend at this point. We will resume again on Monday.

(Adjourned to December 11, 1944, at 10.30 a.m.)

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UNITED STATES OF AMERICA

VS.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, December 11, 1944, 10:30 a. m.

Trial resumed.

Mr. DIXON. May it please the Court, when we adjourned, we were about to comment on Plaintiff's Exhibit J-3, which is the license agreement between KK and TK. In this contract, KK grants to TK exclusive licenses in the Licensed Field under all patents then or thereafter owned by KK. This also provides for the manner and procedure in exchanging patent applications so that the other party to the agreement may determine whether that party wishes similar applications to be filed within its particular territory.

Other provisions such as those requiring employees to assign their contracts or their patents is also contained in this agreement. Both parties likewise agree never to contest the validity of any patents that they may be licensed to use by the other party during the term of the agreement.

KK also obligates itself to purchase its requirements of titanium pigments from the Japanese TK formed for the purposes of manufacturing and selling titanium pigments within the territory allocated to the Japanese company.

Exhibit J-4, license agreement D, page 312 of the printed exhibits, is between Doitsu as trustee for the European allied countries, Tinc, IG and TG, wherein Doitsu as trustee grants to TK, licenses on behalf of Tinc, IG, TG, and TK in turn grants licenses to Doitsu as trustee for the parties named on all titanium pigment patents pursuant to the obligations imposed on it under the contracts. The licenses are exclusive and each party agrees not to sell or permit to be sold within each others territory the products manufactured pursuant to any of the patents

licensed. If any such sales are made, they are to be made through the other party into whose territory they are made as the exclusive agent and at prices to be determined by the exclusive agent.

Both parties to the agreement undertake to prevent their customers from competing in the territory of the other party, and if such competition does develop take steps to avoid that and correct that competition and prevent it from continuing.

Exclusive licenses are then granted on any patents which the respective parties may have at the time or in the future for their respective territories, and each party agrees to cooperate and exchange full and complete information in detail as to any technical knowledge obtained by it relating to the manufacture of the products under contracts or licenses in the Licensed Field; these obligations to assign patents from the employees of any of the companies are also contained in these contracts, so that those inventions would be made available to all of the parties to the agreements.

Now Exhibit J-5, number E, is merely an agreement between TK and KK, relating to the furnishing of supplies and services by KK to TK.

J-6, contract F, is merely the minutes of an agreement between TK and KK covering the terms of the agency between the parties theretofore provided for in the contract.

The Court. Mr. Webster.

Mr. WEBSTER. If the Court please, Government counsel has now put before the Court a series of agreements relating to the 1920 agreement, that is the so-called European agreements, and has commented very fully about the terms of those agreements. I believe that at this point before reference is made to the so-called Canadian agreements, it would be pertinent for me to make some comments with reference to this whole series of agreements in line with the kind of comment that has been made by the Government and in the case of du Pont, or the agreements to which du Pont was a party—the du Pont agreements.

Before I refer specifically to the 1920 agreement, of course it is now perfectly apparent from chart No. 5 which the Government brought to our attention—

The Court. The production chart?

Mr. WEBSTER. The production chart, and which Mr. Whitney so warmly embraced as his own Exhibit 1, that

in 1920 when that 1920 contract was made there was no business in titanium pigments.

470 That the Americans and the Norwegians holding certain patent rights were simply aware that each was engaged in the process of research and invention and that Dr. Jebsen came over here at the suggestion of the Americans to consider what should be done about opening up this incipient art. It was realized that each had something to contribute—the schedules attached to the agreement of 1920 and the recitals show that—and it was decided that they should pool all their interests in the field of invention and research in the interest of opening up this new art.

Now there are certain features of the 1920 agreement that attract attention and I believe warrant some reference. The first is that it stands out from an examination of that agreement that the parties believed that if there was to be any exchange of invention and research there should be a complete exchange; that if the parties were to allow each other to use their patents they should also, of course, allow each other to use their know-how, and it followed from that, I think very logically and naturally and properly, that if they were to confer upon each other not only patent rights but all of their experience of the art and their discovery they should also provide that future patents should be included; that if they were to
471 have a partnership for the purpose of developing this new substance one partner should not be permitted to hold back from the other partner things required to produce the most perfect product under the exchange that they had agreed on. This was to insure of course that the art would really be opened up and there would be no research which would permit one party to stand or lie as the dog in the manger and prevent the comparable growth of the other party. In other words, it was a real partnership.

Now the second feature that stands out in our opinion is this, that instead of merely dividing up this business between them as they might well have done under their patents, the Norwegians and the Americans anticipated that licenses would be granted to others. They might have simply stood fast and said, "Now we will just develop this between ourselves and will not permit anybody else to take any part in it"; but that was not the plan. Licenses to others were anticipated from the very beginning. It followed from this that if the National Lead Company and

the Titan Company A/S, it followed from this that those two companies should each get back from their licensees whatever the licensees were able to develop in the way of patents or know-how or future patents. In other words, if licensees of these two parties were to be taken
472 into this partnership they, too, should be expected to act like partners and act in good faith and to a complete extent return to the licensors the benefits which they were able to develop so that the art would be a truly open art.

Now I might add parenthetically at this point that the National Lead Company has never refused to grant licenses to anybody under its patents.

Now the third feature which stands out in an examination of this 1920 agreement is that, having regard to the conditions of the industry, namely, really that there was no industry and to the positions and relations of these parties as I have described them, the territorial provisions were regarded by them as a reasonable incident of the exchange of patents and know-how. The American company was engaged in the production and business in America, the Norwegian company was engaged in business in Europe, and this seemed to be a reasonable incident of that exchange. There is one feature which has been mentioned before, namely, the attempt on the part of the parties to the 1920 agreement in writing to control to some extent the export and import of finished articles. Of course there weren't any finished articles containing titanium com-
473 pounds at that time; they were simply looking forward from the day in 1920 to the time when there might be, and with Norwegian thoroughness putting in something which somebody thought about or thought might happen. The fact is of course, as I have said before, that that was not enforced; to the extent that it still has any vitality whatever it is relinquished. And if the National Lead Company was in a position to do so, it would be prepared to cancel out that provision in the 1920 agreement.

Now, what was Dr. Jebsen doing between 1920 and 1927? I think the next significant step in these proceedings is the step or steps which led to the 1927 IG or German agreements, but something was happening over there which I think is apparent from the record thus far developed. Dr. Jebsen went back to Norway—he had a small company, he was producing the ore, ilmenite, in Norway, and was carrying on his researches and he was endeavor-

ing, as one might expect him to do, to sell his product in Europe; and the consequence of that was that there were sales arrangements made in France, followed in 1927 by the French agreements which are now before your Honor. Jebson was doing precisely what I think many business men in the same circumstances in Europe would have done—he was using existing facilities and in France
474 he used existing facilities in the shape of a concern engaged in selling chemical products.

Now having made those arrangements and thinking perhaps at one time that there might be occasion for manufacture in France—actually there was none and there never was any manufacture in France, simply sales agreements—he made sales agreements with Greeff in England and he arranged with Greeff as one might expect he would that Greeff would sell the Norwegian product throughout the British Empire. Jebson had no facilities of that sort, and the natural and proper thing for him to do was just what he did, I submit, namely, to make an arrangement with Greeff to distribute this product in England, in the United Kingdom and in the British Empire; and also, sales were made in Belgium and Holland.

The time came when overtures were made by the IG to Dr. Jebson's creditors looking toward to the acquisition of this Norwegian company. Dr. Jebson did not embrace those overtures and he was authorized to negotiate with the National Lead Company on behalf of the owners of the Norwegian company, including of course himself to a limited extent, and the National Lead bought 87 per cent but insisted that Jebson remain as the manager. He was the man who knew about the business, who had originated it, and he did remain. And the IG was deprived of obtaining the ownership of the Norwegian company.

475 Now at this same time, I think the record now permits me to say, the IG was negotiating with Jebson for a license. It was interested in getting into this business. Between 1920 and 1927 it observed what was going on and undertook to negotiate for a license, and as your Honor knows, that led to the preparation of the German agreements which are now on record here.

Now what did the Norwegian company get under the German agreements? I think that is a critical consideration to which your Honor will desire to give some attention. In the first place, the Norwegian company got what may roughly be described as IG's good will. We do not think of IG as having any good will, certainly in this part

of the world, but in 1927 IG did have something that might roughly be described as good will, not only in Germany but in the whole of Central Europe. It had a huge and very efficient sales organization. It had, as all know, a magnificent research organization. (We might now wish that that research organization had been less efficient than it was.) It had huge potential know-how in this field which was attractive of course to Dr. Jebsen. In addition to those things it had cheap manufacture. It had a factory and a factory site, and it had raw materials, cheap sulfuric acid. And all of these, yes, were gladly received.

476 It also got under the German agreement another very valuable right which proved of great value to the British and to others, namely, a call on the IG for 50 per cent of IG's production at cost. It could simply call on the IG to turn over to it 50 per cent of their entire production at cost.

Now of course, what did the IG get? The IG got the patents, the Norwegian and American patents; it got the know-how, and it got something which was then valuable to it—it got ilmenite from Norway not at cost as in the case of the IG production to Titan A/S, but it got ilmenite at cost plus 10 per cent, so that it was in a position to acquire this.

The result of all this was a joint venture to which each paid in 50 per cent of the capital, and of course, though the arrangement was made between the Norwegian company and the German company, the National Lead Company put up the money.

Now that leads us I think to the few comments concerning what might be described as the European agreements and the European situation. There was a man in France named Joseph Blumenfeld, a chemist, who had some patents. Whether he had a complete process or not does not appear. But he had some titanium patents but they were held by Terres Rares, a French Company.

477 Terres Rares had licensed these Blumenfeld patents to Thann & Mulhouse in France, to Montecatini in Italy, to Aussig in Czechoslovakia, and I believe to Laporte in England, and what the German companies did, which I think is typical of what German companies were doing and did do for some time before and after that with reference to many fields of industry, was to make a deal with Blumenfeld based on the then production or sale of TG and Blumenfeld, namely, 70 per cent for the interests that might roughly be described as

the TG interests, and 30 per cent to Blumenfeld. This did not take in, as I understand it, the British Empire or the United States. It related exclusively to the situation in Europe in what is described here as TG's or IG's territory. It was a typical European quota arrangement of which there are thousands of examples, as your Honor well knows.

That brings us down to the 1933 British arrangements. There was, as I have said, this sales agency arrangement with Greeff which, for reasons of which I think we all have knowledge, was to a large extent unsatisfactory. There was the well known Buy British campaign which was particularly current at that time; there was the traditional conservatism of the British master painter or mechanic to use a product coming from abroad with which he was not familiar, having always used a different kind of product for paint; there was the tariff situation and other matters which will be more fully developed later.

Now in addition to that we have ICI, one of the largest chemical companies in the world, a combination brought about after the last war to unite the interests of British chemical firms, and we have the ISC, a very powerful company engaged in the heavy chemical business, and the Goodlass Wall Company, which was a very respectable company which engaged in sales throughout the British Empire. They were, I believe, allied in other matters as well as with reference to the formation of BTP, and, as I say, were all engaged in manufacturing and producing heavy chemicals.

Now the advantages apparent from an inspection of these British agreements were the same or similar to the advantages under the IG arrangement. The National Lead Company and the people associated with it got the enormous research facilities of these great British companies. They got a huge amount of chemical know-how which was of inestimable value to them. They acquired their enormous good will, access to their sales facilities. They received a factory site at Billingham, which is referred to, and they got the raw materials necessary for the production of the product.

479 The COURT. I do not quite understand when you say the National Lead got these things. I did not think they got anything. They got these enormous research facilities in the sense that the industry might be said to

have obtained them, but I do not understand you when you say National Lead obtained them.

Mr. WEBSTER. I mean National Lead obtained them in the sense that National Lead, under the 1933 British agreement, was entitled to receive back from BTP all of the fruits of BTP's enterprise in this field, and of course, as your Honor knows, ICI transferred to BTP its patents relating to titanium production, and ICI and ICS and Goodlass Wall all agreed to refrain from manufacturing in that field and to pool their interests, so that National Lead, in the sense that all it received was 49 per cent of the stock, subsequently reduced to about 44 per cent, had a great interest in the prosperity and success of BTP, apart from the know-how which came back to the United States—know-how and patents and patent rights. Of course incidentally the National Lead Company sold an unsuccessful sales business in England for £125,000 of B shares of BTP, which, if not then, perhaps some time in the future would have a substantial value.

Now what did the British get? In the first place, 479-A they got a thing of great value to them. They got IG's production. They got that 50 per cent right which Titan A/S had until such time as they were in a position to build a factory, so that they received an immediate source of supply of great size and value and they, of course, received the patents and know-how.

480 Now when this arrangement was made we, that is Titan Company, Inc. or National Lead Company, put up one half of the paid-in capital. As I say we got the £125,000 pounds of B shares and 44 per cent of the A shares.

Now the Japanese arrangements are not essentially different from that. Your Honor will recall that under the agreement between Titan A/S and the IG, the IG received Japan as part of its territory. Now at that same European agreements, Blumenfeld had been given as his time, or subsequently, under what we have called the European agreements, Blumenfeld had been given as his quota by these European companies 30 per cent of the Japanese market, so that it transpired, as one might expect it would, that when arrangements were made with reference to Japan the division of interest was substantially on the basis of 70 per cent for the interests there represented by IG and 30 per cent for the interests there represented by Blumenfeld or Terres Rares.

Now in case your Honor has not clearly got the exact

division of interests in that I have made some notes on it which are simple enough but which I think may possibly be of assistance:

The local Japanese group received 50 per cent of the Japanese enterprise.

The so-called European group, that is IG and 481 Blumenfeld, received 50 per cent.

Of the 50 per cent that went to the European group, so-called, 70 per cent went to Titan Gesellschaft, TG, and 30 per cent went to Blumenfeld.

And of the 70 per cent that went to TG, of course the interests represented by the National Lead Company received one-half of this.

The papers show that the National Lead Company or Titan Company, Inc. actually put up TG's share of the cash—

The COURT. Who put up the cash?

Mr. WEBSTER. The National Lead Company put up TG's share of the cash, the capital contribution, giving TG an option to repurchase that share and that, of course, was because of restrictions then existing on the export of funds from Germany.

Thank you very much.

Mr. WHITNEY. If your Honor please, I only want to make a very brief comment, that with this opening of the new week of the trial in this interesting and brief review by Mr. Webster we have brought into relief—and I submit to your Honor the documents as a whole and the record as a whole shows this—that here are these worldwide complexes of agreements representing this apparently 482 remarkable energy of Dr. Jepsen over a period of 16 years, with the finances of National Lead behind him, developing all these complex relationships, Germany, France, Great Britain, and finally Japan, and du Pont is not a party to any of this. Du Pont's problem is simply one of an American manufacturer seeking to enter this industry which has thus been created and which it finds in existence as an industry with a highly developed situation in patents and in expert knowledge in which the National Lead has at its disposition in the United States, not merely its own work but the fruits of the work and the fruits of the agreements that it had made throughout the world. Now whether those agreements were or were not in restraint of trade within the United States within the meaning of the Sherman Act as construed in the innumerable cases that began with the Addison Pipe & Steel and terminating with your Honor's opinion in the

Dyestuffs case is a complex problem which I believe we are going to be entitled to stay out of. Although I know that there are coming odd bits of evidence where these very energetic gentlemen on the other side from time to time tried to suck us into it, I think your Honor is going to conclude on the whole that there is not any doubt that we stay out of it, whatever it is and whether it is good,

as Mr. Webster is submitting, or evil, as Mr. Dixon 483 is submitting. But you could not have this world-wide situation, or, putting it in a more homely way, you could not have these 485 pages of paper without it making some dent on the du Pont position. We produce about 8 per cent of the chemical products in the United States, about one-twelfth, and this is one of the very minor, but none the less promising, new chemical fields, and we want to get into it and as we want to get into it we face this huge situation that has been described to your Honor.

Our problem is simply to get the rights determined, the knowledge, the patent licenses, the know-how from this great group in whatever way we can consistent with the laws of the United States. It certainly is not worth while to the du Ponts to violate the laws of the United States in order to enter this new market of art. I think that is what the record is showing.

The COURT. Mr. Dixon?

Mr. DIXON. I just wanted to add, in view of the comments made by counsel for defendants—

The COURT. No. That is one thing I am not going to let you do. We are not going to have a reply on each one.

Mr. DIXON. All right, your Honor. I take it your Honor understands the Government will present its case in 484 all of its phases as it develops its picture.

The COURT. This is a restriction more of necessity than anything else. Otherwise we are going to simply argue and reargue this case at every stage, and that is something I cannot have. I am perfectly willing to have you gentlemen call my attention to such parts of the exhibits as come in and make comments to facilitate my comprehension, but I don't want to get into any re-arguments.

Mr. DIXON. That is so. My intention was to comment merely upon these agreements, and that is all that we ask.

The COURT. You have had your opportunity.

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibits J-7 and 8 for identification. I don't know as either

of you gentlemen have copies of this. I will show them to you. They are very short—just to complete the J series.

Mr. WEBSTER. This is simply subject to the objection we have heretofore made with reference to the Japanese situation as presented by Mr. Dixon.

The Court. All right. It is a footnote to the Japanese situation?

Mr. Dixon. That is right.

The Court. All right.

485 (Plaintiff's Exhibits J-7 and J-8 for identification received in evidence.)

Mr. Dixon. We now wish to offer Plaintiff's Exhibit K in evidence, the same being agreement of cooperation between Canadian Industries, Ltd., or CIL, and the National Lead Company, dated January 1, 1937, providing for the formation of a Canadian company to carry on the titanium pigment business in Canada. That is on page 329 of the printed exhibits.

Mr. WEBSTER. We have examined this exhibit and we make the objection that it relates, as appears from its face, to the Canadian company which is not present here and whose interest would be adversely affected if the purpose of this action is to cancel the agreement.

I might also remind your Honor at this point that it has heretofore been stated that in the case of the Canadian arrangements, as in the case of the British arrangements, the defendants have negotiated revision agreements which will supersede the agreement about to be referred to by Government counsel.

Mr. WHITNEY. Just the continuing objection.

The Court. The objection is overruled. Plaintiff's Exhibit K is received in evidence.

(Plaintiff's Exhibit K for identification received in evidence.)

486 Mr. Dixon. We wish to offer Plaintiff's Exhibit K-1 in evidence, the same being an agreement between the National Lead Company and Canadian Titanium Pigment Ltd., or CTP, dated January 1, 1937, and found on page 341 of the printed exhibits.

Mr. WEBSTER. The same objection.

The Court. The objection is overruled.

(Plaintiff's Exhibit K-1 for identification received in evidence.)

Mr. Dixon. We wish to offer Plaintiff's Exhibit K-2 in evidence, the same being agreement between Canadian Industries, Ltd., or CIL, and Canadian Titanium Pig-

ments, Ltd., or CTP, dated January 1, 1937. That is on page 361.

Mr. WEBSTER. As to that I make the further objection that it is an agreement between Canadian companies not present here and that it is irrelevant and immaterial.

The COURT. The objection is overruled.

(Plaintiff's Exhibit K-2 for identification received in evidence.)

Mr. DIXON. I now wish to offer in evidence Plaintiff's Exhibit K-3 for identification found on page 367 of the printed volume, and being an agreement between National Lead Company and CTP, dated January 1, 1937.

487 The COURT. These being all chapters of the proposed agreement K.

Mr. DIXON. That is right, your Honor.

The COURT. Contemporaneously executed by the parties named.

Mr. DIXON. Yes, your Honor.

Mr. WEBSTER. The same objection on that. I might point out that is an agreement under which the Canadian company gave the National Lead Company 8,000 B shares for the National Lead Company's going concern in Canada. It does not seem to be very material to the inquiry here.

The COURT. As to whether or not it would be material as an independent instrument is one thing, but, as I understand the terms of K-3 are really set forth in K as one of the agreements to be executed as part of the master agreement. It seems to me that it would be in order to offer them all as part of Exhibit K. They are simply clauses of a master agreement requiring separate execution, frequently, because they deal with specific problems or because they are to be executed by a corporation to be formed and formed pursuant to provisions of Exhibit K. The objections are therefore overruled.

(Plaintiff's Exhibit K-3 for identification received in evidence.)

488 Mr. DIXON. We wish to offer in evidence plaintiff's Exhibit K-4 on page 369 of the printed exhibits, being an agreement between CTP and British Laporte, Ltd., or Laporte, dated December 4, 1937.

Mr. WEBSTER. I make the same objection as to this agreement, and in view of your Honor's explanation of his ruling with reference to the previous offer, I point out that this agreement is not an agreement referred to in Exhibit K—that it is a wholly independent arrangement

between the Laporte, Ltd., an English company, and CTP, and the only reason the Government has a copy of it is that when they examined our files we obtained one as a matter of convenience and courtesy and gave it to them.

489 Mr. Dixon. I might add, your Honor, I am reserving comment or would like to comment on all these documents, as in the previous series of exhibits, when I have completed.

The COURT. I will overrule the objection.

(Plaintiff's Exhibit K-4 for identification received in evidence.)

Mr. Dixon. We wish to offer in evidence Plaintiff's Exhibit K-5, the same being an agreement between the National Lead and CTP dated February 27, 1939.

Mr. Webster. The same objection.

The COURT. Objection overruled.

(Plaintiff's Exhibit K-5 for identification received in evidence.)

The COURT. I should comment to Mr. Webster, in view of what he said about the last exhibit: Once the Government establishes an arrangement as it does under Exhibit K between some of these companies and then there is at least a prima facie case of a combination or conspiracy or whatever you might want to call it, then of course further acts of the conspirators become admissible in evidence provided they are in furtherance of the conspiracy. On a theory of that character there would be no trouble in admitting exhibits like K-4.

Mr. Webster. I can appreciate your Honor's
490 desire in a case of this sort to look at all the agreements whether they are precisely related or not, but I felt that I should point out that difference.

The COURT. Oh, I am glad you do, and I think you should state your objections because as I reread the record it is the only way I can become aware of what is going through your mind, as I stated, and I state my views occasionally so as to remind myself as to what induced me to let it in.

Mr. Dixon. We wish, your Honor, to briefly comment on these series of exhibits which, as your Honor has mentioned, deal with the Canadian picture or territory in the titanium pigment field.

First, Exhibit K, as your Honor has also stated, was the contract between National Lead Company and CIL, shown on chart No. 4, which provided for the organization of this

new Canadian company, CTP, the purpose of which was to carry on the titanium pigment business in Canada. In this Exhibit K the parties obligate themselves to exchange or give to this new company the exclusive rights on all patents relating to the Licensed Field that they may then own or thereafter acquire, and CIL, the Canadian Company with which this agreement was made by National Lead, agrees in Exhibit K not to deal in or to manufacture titanium compounds in any part of the world except at the request of CTP, and National assumes the same obligations; that is, not to manufacture any pigments in Canada and Newfoundland without the consent and approval of this Canadian company.

National agrees to supply this new company with titanium compounds on a cost plus 10 per cent basis until the Canadian company commences the manufacture of titanium pigments, and National also agrees to have or permit BTP, the British company, to furnish a limited supply to the Canadian market on the same basis. The agreement is to remain in effect until January 1, 1967 and unless terminated with the provisions within the requirements of the contract which were the giving of a 12 months' or year's notice of the intention of either party to cancel the agreement before it could be cancelled. It extends itself indefinitely until such cancellation notice is given.

Now Exhibit K-1, between the National Lead Company and CTP, this new company in Canada, provides for the granting of the exclusive licenses required to be granted this company in Exhibit K in the titanium pigment field not only of National's then owned titanium pigment patents but any that they might thereafter acquire in the future. Customers of CTP may sell finished articles in National's territory but no such sale can be made by the CTP itself without complying with the obligations of Article VI(c) of the 1920 agreement.

The COURT: You say that CTP customers may sell finished products in the United States?

Mr. Dixon: That is right.

The COURT: To that extent, that is a departure from the other.

Mr. Dixon: A slight one. There is a qualification as I will point out, to that right in a further portion of the contract.

Now this contract does provide that while CTP is obligated to give to National for its territory any patents that it might thereafter acquire that National wants in the

United States, that even though this license is to be exclusive from CTP to National if du Pont wants a license on any of these patents du Pont is to share that license with National or at least is to have a similar privilege provided it pays one-half the expenses of granting the license.

Mr. WHITNEY. Which paragraph is that, Mr. Dixon?

Mr. DIXON. Now I am reading from my summary.

The COURT. Are you offering the marginal note on page 342 in Exhibit K?

Mr. WEBSTER. I was going to remark when Mr. Dixon got through that Mr. Dixon's assistants appear to have put some marginal notes on a number of these Canadian agreements, and I think it will be agreed that none of them is material and they ought to be removed.

Mr. DIXON. I concur with that.

The COURT. I will strike out the marginal note on 342 and I will strike out the others as I come to them.

Mr. DIXON. If there are any they are obviously not to be part of the exhibit.

Mr. WEBSTER. There is one on 329. I think they all ought to go out.

The COURT. All right.

Mr. DIXON. Now the provision that Mr. Whitney inquired about I believe is found in paragraph III. Now any sales within the territory of CTP by the customers that I have mentioned previously that might be permitted are to be kept within the limits of Article VI(c) of the 1920 agreement, which your Honor may recall was the one where if there was any competition—

Mr. WEBSTER. That is in the limits imposed by the note to Article VI(c).

Mr. DIXON. That is right. In other words, subject to that limitation, that if there were any such sales and they interfere with the business of CTP, for example, in Canada or with National in the United States that efforts were to be made to stop and prevent those sales upon request of the other party to the agreement in whose territory they were being made. And CTP agrees to grant licenses direct to any of the companies, the so-called companies so-called, that National may designate, subject again, however, to the granting of similar licenses to du Pont if requested by du Pont. Then follows the specific provision I suggested a moment ago, although not in detail, that neither National nor CTP will sell or permit to be sold within their respective territories any of the products

within the Licensed Field and agree to take steps to impose this obligation upon their respective customers. And if either party permits these sales or imports into the territory of the other the party in whose territory such imports are made shall be the exclusive agent for such sales within that particular territory. And then CTP appoints Titan Company or any licensee of Titan, Inc., that is Tinc, as its agent for any sales outside of North or South America and the agent, either Tinc or anyone designated by it, in whose territory such sales may be made is authorized to fix the prices and conditions for resale of the products sold by the agent. And each party undertakes to prevent its customers from competing with each other in each other's territory. In other words, there are several references made in this contract to the sales by customers or purchasers of the products from either party in the territory or outside the territory, and I endeavored to 495 cover them in the order mentioned.

Then we have the provision relating to the procedure to be followed in filing patent applications and exchanging them, and CTP agrees to render semi-annual statements of its production to National and to impose upon any licensee the obligations and conditions of Article XIV of the 1920 agreement. It is then provided that each party shall exchange know-how or technical information and be authorized to visit the plants of either party and have the other privileges that we have seen in some of the other Titan agreements relating to the exchange of know-how.

The contract can only be assigned in connection with the transfer of the entire business of the party, the contract itself, and the assumption by such transferee, if it is sold, of the obligations of the contract. And sub-licenses can be granted, as suggested previously, provided the licensee agrees to assume all the obligations previously referred to.

The Court. We will suspend at this point.

Mr. WEBSTER. If the Court please, there is a matter I would like to take up in chambers, if I may.

The Court. I will be glad to see you all inside.

(Short recess.)

496 Mr. DIXON. With reference to K.2, the agreement between CIL and CTP, in this agreement CIL grants to CTP exclusive licenses on any patents or processes which it then has or might thereafter acquire in the Licensed Field and obligates itself to see that CTP carries out the provisions of its contract that is entered into with

National Lead.

K-3, the agreement between National Lead and CTP, is one in which the Canadian business of National Lead in the titanium pigment field is transferred to the new Canadian company, CTP, and National agrees to make available to CTP all of its technical know-how and experience in the titanium pigment field.

Exhibit K-4 is the agreement between CTP and Laporte which, as previously mentioned, was engaged in the titanium pigment business in the Canadian market. This contract transfers to CTP all of the Canadian business and patents of Laporte in Canada as well as any future Canadian patents which it might acquire in the Licensed Field to this new Canadian company CTP, and any future patents that Laporte might acquire are to be given to the Canadian company on a royalty-free basis. And if it should acquire, that is if Laporte should acquire any patents re-

lating to the Licensed Field outside of the Canadian
497 territory, it agrees to make those available to the new Canadian company, that is, to use its best efforts to secure them for the Canadian company. There is a restrictive clause in this contract obligating Laporte not to engage in the titanium pigment business in Canada until after January 1, 1953.

Now Exhibit K-5 is merely the amendment to the contract Exhibit K extending the Licensed Field or the field of operations of these various companies which your Honor has seen in the other Titan contracts.

The COURT. Mr. Webster.

MR. WEBSTER. No comment.

The COURT. Mr. Whitney.

MR. WHITNEY. Well, if your Honor please, just a few minor points that I noticed in going over it. At page 330 in the first of these agreements, K, between CIL and National Lead, in paragraph (5), it recites that CIL has access to the technical information of du Pont for use in the Dominion of Canada and the Colony of Newfoundland. On that I ought to say to your Honor and to the Government to save time that it was an agreement for exchange of information between du Pont and CIL and that that exchange of information was cancelled subsequently, at the same time as du Pont cancelled the National Lead so far as titanium pigments were concerned. Your Honor and

498 Mr. Dixon will both observe at once that from du Pont's point of view that was necessary, otherwise, to use the phrase that was then used, information

from du Pont would have flown around the corner through CIL back to the National Lead from whom we were cutting ourselves off. But before that we had this inter-American-Canadian understanding with CIL that they would have our information.

On page 336, the same agreement, at the bottom of the page, paragraph 9, I am told that that factory in Canada was in fact never erected. I thought the record ought to show that and Mr. Dixon would be glad to have it right.

The COURT. Is that conceded all around?

Mr. WEBSTER. That is conceded.

Mr. DIXON. That is right.

The COURT. It is conceded that the factory mentioned in paragraph 9, page 336, was never erected.

Mr. WHITNEY. And I take it similarly, at page 369, K-4, the first recital, "Whereas Canadian Titanium is engaged in the business of manufacturing and selling"—I take it in light of the fact that the manufacturing never was engaged upon that that means planning to engage. I think as a matter of fact it is engaging in the sense in which people use it in Norway. It is familiar European language.

There are really some delightful expressions here.

498a I hope they are being incorporated in the language—

Mr. WEBSTER. That particular comment is gratuitous, for the reason that we do not appear to have anything to do with it.

Mr. WHITNEY. It is not meant to be unfriendly.

The COURT. It is a good Norwegian custom anyway.

Mr. WHITNEY. And then on page 337, the very next page of the original agreement—

499 The COURT. We are back in Exhibit K?

Mr. WHITNEY. Yes, your Honor. I was linking up the 369 to the 336. Those comments went together.

And then this third comment on 337, paragraph 11. Your Honor will observe at the end of the statement:

"It is understood that for the purposes of this Clause, E. I. du Pont de Nemours and Company, Inc. shall not be deemed to be an associated company of C-I-L."

That is a clause in which CIL is binding itself not to operate in certain respects in the balance of the world outside of Canada, and your Honor will recall that du Pont and CIL were exchanging information and CIL put in that it could not bind du Pont in the rest of the world.

The COURT. One of those double-edged clauses?

Mr. WHITNEY. Well, it is a saving clause, doing the

right thing by the party with whom it had another contract.

The COURT. I understand.

Mr. WHITNEY. Mr. Dixon paused under Exhibit K-1 at page 345 with the sentence beginning at line 7, which provided—and that is another similar caveat by CIL, apparently, that they could not give an exclusive license to National Lead without reserving a non-exclusive license

500 to du Pont, and that arises also necessarily as a result of the pre-existing CIL and du Pont-National Lead licensing exchange. And a corresponding provision appears in the reciprocal agreement K-2 on page 362. The first is the agreement between BTP and National Lead, and the second is the agreement between BTP and CIL. Your Honor will observe that fits into the same subject matter; that here was apparently CIL which had a preexisting agreement for exchange of information and non-exclusive license, which I submitted to your Honor the other day is only a liberalizing agreement, we say, and saves its obligations to us apparently in these agreements it makes with this new group. And your Honor will observe also that somebody adds on at the end of these phrases, “but such sublicense shall not be subject to the conditions stipulated in Article XIV hereof.”

The COURT. Does that mean “hereof” in Exhibit A?

Mr. WHITNEY. I don't think we need pay much attention to that. One of my associates called my attention to it but I don't think we need pay much attention there; the Article XIV in this agreement is comparable and follows the pattern of Article XIV in the 1920 and other agreements and they have been so kind as to write us out of what we never were in.

Then we turn up again on page 376 in Exhibit K-4, which is the exhibit to which Mr. Webster added
501 as a ground of objection that it was between the English company, Laporte and CTP, and there at the bottom of page 376, the last line, is a proviso that CTP or its licensees or sublicensees shall be permitted to make sales in bulk to du Pont in the United States.

Now there again there appears to be a reservation that they can sell to us in bulk, or buy it, not perhaps in individual small quantities, but that would be an exception to their having agreed to disenable themselves from selling it abroad. So we, as usual, appear to be in the happy position of being mentioned only as people who are to

enjoy additional unrestraining or disrestraining licenses and rights of purchase.

And finally in K-5, the agreement between National Lead and Canadian Titanium at pages 381 to 383, your Honor will observe on page 383 the familiar expression which we found about in early 1939 in each of these four great groups of agreements, German, British, Canadian and I believe the French or International, that is to say, that the associate companies under Article XIX of 1920 and also du Pont are reserved a certain right which is set forth in each of those agreements.

I only want to add, your Honor, the self-evident fact that once more across the border we are not parties to any of these agreements although they do reserve 502 us these opportunities to purchase and to have the benefit of Canadian inventions. It is true that we had a minority investment in CIL; we did not control it; we did not have officers of it. And if the Government does introduce further evidence it will show we did not control these agreements, just as we did not control any part of the CIL operations. So that if these agreements leave us where the other agreements left us, as outsiders who have special arrangements under which we get for ourselves, and therefore for our customers in the United States, certain benefits under patents and under know-how, that is all there is to it.

Mr. Dixon. Having taken your Honor on a tour around the world with these various agreements, we will now bring you back to the United States, where we offer Plaintiff's Exhibit L, the same being agreement between du Pont de Nemours and Company and the Virginia Chemical Corporation, dated August 5, 1937.

Mr. WHITNEY. We have no objection.

The COURT. There being no objection, it will be received.

(Plaintiff's Exhibit L for identification received in evidence.)

Mr. Dixon. This is a license from the derendant du Pont to the Virginia Chemical Corporation, which 503 your Honor will find on chart No. 4, and is the only other license granted by either National Lead or du Pont to any American company engaged in the titanium pigment business.

The COURT. When you say "the only other" you mean the Zirconium Corporation?

Mr. Dixon. That is right, your Honor. We direct your

Honor's attention to the fact that this is a non-exclusive license to manufacture titanium dioxide and covers a license of 43 du Pont patents to Virginia Chemical Corporation; those patents relating only to the manufacture of titanium dioxide or TiO_2 as we have previously used that chemical designation for titanium dioxide. It is in the nature of a cross-license agreement between these two companies only to the extent that Virginia Chemical gives back to du Pont a license under two of its patents to manufacture, use and sell titanium dioxide thereunder in the United States. These licenses going from Virginia Chemical to du Pont, however, are on a royalty free basis, whereas the licensee, Virginia Chemical Corporation, pays a royalty to du Pont of a quarter of a cent, I believe, a pound, or it is a flexible royalty, on all titanium dioxide produced by this company.

~~The Court.~~ Virginia Chemical also had a license from National Lead, did it not?

~~Mr. Webster.~~ No.

~~The Court.~~ It was Zirconium that had both?

~~Mr. Dixon.~~ It was Zirconium that had both. This company only had a license from du Pont.

Now the important feature that we want to draw to your Honor's attention in this agreement is the restriction imposed upon the licensee as to the amount of titanium dioxide which the licensee may produce under this license as follows:

3000 tons for the years 1937, 1938 and 1939 respectively; 6000 tons for the years 1940 through 1946 respectively; and 9000 tons thereafter.

The license is to remain in effect until all of the letters patent on the license agreement have expired except that upon Virginia Chemical producing information to du Pont that it is infringing any of the thirty—

The Court. Let me read that clause which you are referring to.

Mr. Dixon. Yes, your Honor. It is on page 389, paragraph 7, which gives to Virginia Chemical the right to terminate the agreement under the provisions of paragraph 7 upon showing that the products made by it, and the methods of producing the same do not infringe the claims of any of the unexpired letters patent licensed to the Virginia Chemical Company.

505 The Court. I do not know, but I think I understand what is meant by that language. It only means that at the end of ten years du Pont is no longer

a licensee and of course no longer being a licensee it must not infringe any longer, but having contracted to take a license it obligates itself to indicate, and do more than that, to indicate to the licensor on what grounds it believes it is to be no longer operating under the patents; in other words not infringing.

Mr. DIXON. That is right. I do not attach any particular importance to it. I merely mentioned it because Mr. Whitney mentioned it as being in the license to the Zirconium Corporation. The restriction would be applicable on the production of Virginia Chemical, as I think I pointed out, of all titanium dioxide produced by this company under this license agreement.

The COURT. Of course I do not know what that agreement means; that if after ten years Virginia decides the patents are invalid it may then proceed to manufacture free of the license agreement? Normally a licensee cannot challenge the validity of a patent.

Mr. DIXON. That is provided for in this agreement.
506 The COURT. Certainly. Whether or not in this language it must show evidence of non-infringement includes the idea of invalidity, I do not know, but I do not have to pass on it.

Mr. DIXON. We attach, as I have said, no importance to this provision as far as being of any material benefit to the licensee is concerned.

The COURT. Mr. Webster.

Mr. WEBSTER. I believe my friend Mr. Whitney comes first on this.

Mr. WHITNEY. Does your Honor have the earlier exhibits before you?

The COURT. I have all the printed exhibits.

Mr. WHITNEY. Then I just want to hand you Exhibit 47 for a moment. Exhibit 47 is the report of the net tonnage of Virginia Chemical and the royalties. Your Honor will observe a steady and constant growth, year by year, of such a character that in the normal course of growth in 1939 and again in 1942, the Virginia Chemical exceeds the then allowed amount, being 4000 instead of 3000 the first year; 1943 instead of 1942; instead of 6000 in 1943. Now what happened as shown by these two exhibits, and this will be supported by evidence if it is material, is that this clause was never applied; as Virginia steadily developed and as shown in the supplemental answer, it has been cancelled.

507 The COURT. It has been cancelled?

Mr. WHITNEY. Yes.

The COURT. Is it concluded the clause was cancelled, and if so when?

Mr. DIXON. I have no knowledge.

Mr. WHITNEY. You mean you have no proof other than our answer?

Mr. DIXON. That is right. It may well be, as counsel suggests.

The COURT. When do you claim it was cancelled?

Mr. WHITNEY. It was cancelled November 10, 1944, but it had been completely inoperative, in a practical sense, from the beginning, in that we had conceded the increases, and, in a legal sense for over three years last past due to the War Production Board, which governs matters.

The COURT. Do you want to comment any more than the fact at times you yielded and did not insist on the letter of this clause?

Mr. WHITNEY. That is the first fact. The second fact is that with the coming of the war the fact became moot, because how much anyone produced is completely at the disposal of the Government, and the third fact is we formally cancelled the agreement, as such, admittedly on the trial and reported that in a supplemental answer. Those are the same three facts that I gave to your Honor in commenting on American Zirconium and similar comments to the American Zirconium comments run throughout the whole agreement between the two agreements are substantially the same and that means that they are both completely different from the agreement between National Lead and Zirconium, and, indeed, as has already been said, National Lead had no agreement with Virginia Chemical at all.

Now that means, in summary, that this agreement is only an agreement under which Virginia Chemical got our patent rights and therefore were free to engage in the industry without suit for infringement from us, and we do not see that there is any public interest in the agreement under the antitrust laws.

And a last, sort of footnote, comment I want to make is on Mr. Dixon's pointing out to your Honor that du Pont charged the royalty and Virginia Chemical did not. I think the Court can take judicial notice that where party A has 43 patents and party B wants a license, party B pays a royalty, but that it is practically habitually practiced in such licenses to give a license back from the li-

509 licensee party and the license party does not claim to have any patents and it does not get a royalty for the license back; if anything the amount is adjusted in the amount of the original royalty. That is universal and usual procedure. I submit, your Honor, it has no significance whatsoever in a case where the public interest is at issue under the antitrust laws.

The COURT. Mr. Webster?

MR. WEBSTER. I have no further comment.

MR. DIXON. If the Court please, I just wanted to keep the record straight. I thought I understood Mr. Whitney to say this agreement was cancelled. I think you meant to say that—

MR. WHITNEY. Only the quantity restriction provision was cancelled, and the validity provision.

MR. DIXON. We now wish to offer in evidence Plaintiff's Exhibit M, the same being an agreement between du Pont and Tine, dated July 27, 1937.

MR. WEBSTER. No objection from National Lead.

MR. WHITNEY. No objection, your Honor.

The COURT. There being no objection it will be received.

(Plaintiff's Exhibit M received in evidence.)

MR. DIXON. This is one of the five agreements shown on chart No. 4 running from du Pont to Titan, Inc. or

510 Tine, dated 1937, and your Honor will note on the chart that it is a license running from du Pont only to Tine, and that there is not running back from Tine to du Pont any patents. In other words, it is not a cross-license agreement of any patents owned by either party to the agreement. It is merely a license from du Pont on a royalty-free basis of certain patent applications described in the agreement for Great Britain, Italy, France, Germany and Czechoslovakia.

In this license agreement Tine is given the specific right to grant royalty-free sublicenses to TG, BTP and Societe Industrielle. If any royalties are paid on any other licenses du Pont is to receive 50 per cent of any such royalties. Tine is to pay all maintenance fees; that is, any fees that may be required to be paid in any of the countries wherein a license is granted to keep the patents in effect, and they cannot be abandoned by the licensee, Tine, without notifying du Pont of their intention to abandon the patents.

I might also add that in this license the licensee, Tine, is given the right to sue in the name of du Pont.

Mr. WEBSTER. No comment.

Mr. WHITNEY. If your Honor please, this is the first of the five agreements that I forecast when commenting upon the first du Pont agreement, Exhibit M, when I said
511 that the time came when, with the development of the close nationalized situation in Europe, du Pont became willing to grant exclusive licenses under specific patents within and confined to the countries in which those patents had been applied for, and subject to a non-exclusive reserved right in du Pont in case it should ever wish to exercise it.

This particular agreement covers a single invention, these five applications in the five countries named being under that invention.

I want to add this, your Honor, and this is the important point: Of course there are all different ways of reading an agreement, and it strikes me the way to read an agreement, and I submit it to your Honor, that page 393 of the record is in contrast to the other agreement. Now we were in whatever it is that agreement A created, obviously this agreement would never exist. The Government is not submitting to your Honor here agreements of this character submitting specific licenses to Titan, Inc. from National Lead, because their relation is the other, and I take it the main issue in the case. The very reason that we had to grant a specific license agreement where we had reasons so to do, agreements of a patent character and not of a commercial character,—Mr. Dixon's
512 phrase—was because we were not in this alleged combination or conspiracy that is at issue in this case.

Mr. DIXON. We wish to offer Plaintiff's Exhibit N in evidence, the same being a license agreement between du Pont and Tinc, dated June 20, 1938.

Mr. WHITNEY. No objection.

Mr. WEBSTER. No objection.

The COURT. There being no objection it will be received. (Plaintiff's Exhibit N for identification received in evidence.)

Mr. DIXON. This is the second license running directly from du Pont to Tinc, and again covers certain applications or licenses on applications for letters patent filed by du Pont in Great Britain, Germany, France, Holland and Belgium, the applications for letters patent covered in this license need not even have been filed at the time the licenses were issued in this agreement, as is provided for in the

agreement. The licenses are to make available to TG, BTP and Societe Industrielle as well as Tinc, on a royalty-free basis, all the advantages of these patent applications. Du Pont reserves for itself, or for any of its controlled subsidiaries, in this agreement the right to use it, that is

513 use the benefits of any patents in any of these countries, and also the same right is to be reserved to ICI, that is Imperial Chemical Industries, which we

found was a party to the BTP, or the British Empire series of agreements. If any other sub-licenses are granted by Tinc on these patents on a royalty basis, then du Pont is to get 50 per cent of the royalties. The costs of maintaining these patents, as in Exhibit L, is to be met by Tinc.

Mr. WHITNEY. No further comment.

Mr. WEBSTER. Your Honor, I think we should observe in connection with this and the previous exhibit, and in connection with my earlier discussion this morning, that of course Titan, Inc. was not engaged in manufacturing, and that the real purpose of getting these specific licenses from the du Pont Company was to enable Titan, Inc., now a wholly-owned subsidiary of National Lead Company, and then an 87-per cent subsidiary, to enable three companies in Europe listed on page 402, in each of which the National Lead Company or Titan, Inc. had substantially 50 per cent interest, to make use of these patents and exploit them in the areas in which those three companies were doing business; namely, TG, BTP, and SIT.

Mr. DIXON. I now wish to offer in evidence Plaintiff's Exhibit O, the same being an agreement between National Lead and Tinc, dated March 28, 1939.

514 Mr. WEBSTER. No objection.

Mr. WHITNEY. Only the continuing objection.

The COURT. The exhibit is received.

(Plaintiff's Exhibit O for identification received in evidence.)

Mr. DIXON. I merely want to comment on this agreement to point out to the Court that this was the agreement between National and Titan in which the Licensed Field was extended in the 1920 contract to make available to each other any other inventions controlled by the company which covered the subject matter, partly or wholly outside the Licensed Field as determined in the 1920 agreement. We have previously seen that the other Titan agreements were modified to include this broader definition of the Licensed Field.

515 Mr. WEBSTER. I have just this to say about this agreement, your Honor, consistent with what I

attempted to say earlier this morning, that when these people decided that they would release this incipient art they decided that they would release it completely and they found of course that as they went along under the arrangement there were certain materials connected with the manufacture of titanium compounds, such as sulfuric acid and extender pigments, that were closely related to their main business and that being partners in this enterprise they would not take advantage of a special position to injure the other.

The COURT. No comment from Mr. Whitney?

Mr. WHITNEY. No comment.

Mr. DIXON. We wish to offer in evidence Plaintiff's Exhibit P, the same being a license from International Pulverizing Corporation to National Lead, dated April 10, 1939 of certain patented reduction equipment.

Mr. WEBSTER. No objection.

Mr. WHITNEY. There is no objection to this.

(Plaintiff's Exhibit P for identification received in evidence.)

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit P-1, the same being a sub-license from the National Lead to du Pont, dated April 14, 1939, covering the 516 patented reduction process licensed to National by the International Pulverizing Corporation in Exhibit P.

Mr. WHITNEY. No objection.

Mr. WEBSTER. No objection.

(Plaintiff's Exhibit P-1 for identification received in evidence.)

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit P-2, the same being a sub-license from National Lead to American Zirconium Corporation, dated December 1940.

Mr. WEBSTER. No objection.

Mr. WHITNEY. No objection.

(Plaintiff's Exhibit P-2 for identification received in evidence.)

Mr. DIXON. I merely wish to comment with reference to these three exhibits, your Honor, that in Exhibit P, after having licensed National exclusively on this particular equipment on a royalty basis, the licensor obligates itself to give to CTP, that is the Canadian company, the opportunity to acquire a license of this equipment in Canada.

The COURT. Under what agreement is that?

Mr. DIXON. That is in Exhibit P, your Honor.

Now in Exhibit P-1 we see in effect the operation of

the agreement between du Pont and National insofar
517 as the provision of that agreement requires each of
the parties to make available to the other any equip-
ment or apparatus, and Exhibit P-1 is a sub-license of the
right to use such apparatus flowing from National to
du Pont on the identical royalty basis as that enjoyed by
the National Company.

Exhibit P-2 is a sub-license from National to Zirconium
to use this same equipment, dated, as we pointed out,
December of 1940.

The COURT. December 19, 1940.

Mr. DIXON. That is right. And on the same royalty
basis.

Mr. WEBSTER. I think I should just say that while I am
not fully advised as to the fact yet, my understanding is
that the parties to the agreement between the International
Pulverizing Corporation and National Lead Company,
Exhibit P, have undertaken to negotiate some changes in
that agreement, and perhaps at a later time I can call those
changes to your Honor's attention. I am not now informed
as to what they are.

Mr. WHITNEY. I only want to comment that it seems to
be nothing more than National Lead obtaining a right to
a useful machine, granting us a non-exclusive license and
thereafter granting a third competitor, Zirconium, a non-
exclusive license. The Government may feel that
518 there is some dereliction in Zirconium not getting
their license until some time after ours, but so far
as this court of equity is concerned, I submit that is not
worthwhile litigating at this time.

The COURT. I suppose Mr. Dixon would say to you that
you are fragmentizing—

Mr. WHITNEY. No, your Honor.

The COURT. —instead of "puverizing".

Mr. WHITNEY. I am treating the three together. I am
combining instead of fragmentizing or trying so to do.

The COURT. Your next exhibit, Mr. Dixon.

Mr. DIXON. I wish to offer in evidence Plaintiff's Ex-
hibit Q, the same being a cross-license agreement dated
April 21, 1939 between du Pont and Tine.

Mr. WEBSTER. No objection.

Mr. WHITNEY. No objection.

The COURT. Without objection it will be received.
(Plaintiff's Exhibit Q for identification received in
evidence.)

Mr. DIXON. In this Exhibit Q we see the first cross-

license agreement of du Pont's foreign patents to the foreign associates of Tinc and the flowing from the foreign associates of Tinc to du Pont of such United States patents as du Pont wishes to make use of in this country. The foreign patents cover five French patents, two British, one Dutch and seven German and Japanese patents.

519 The COURT. They are all specified, however?

Mr. DIXON. They are all specified in the agreements, yes, your Honor. And in the United States there are 12 United States patents and some applications also are covered I believe, your Honor; ten applications and two patents, making a total of 12 altogether which are made available to du Pont. The licenses granted by du Pont are exclusive and royalty free except that du Pont reserves the right to use them itself or for any of its foreign subsidiaries, and particularly mentions ICI. Titan is given the right, as in the previous agreements, to grant royalty-free sub-licenses within the licensed territories to BTP, TG, Societe Industrielle and TK or the Japanese company. The licenses granted by Tinc to du Pont are on a royalty-free basis.

The COURT. Mr. Webster?

Mr. WEBSTER. No comment, your Honor.

Mr. WHITNEY. Your Honor, I have only this to say. This is the same as the earlier agreements of the two previous years, insofar as exclusive licenses were granted to the foreign companies under the specific patents and within their own countries or, rather, within the countries in which the patents issued. I think I have explained enough

520 of our viewpoint on that. There was no one else to whom we could grant it to keep it alive with the non-reserved right to ourselves. The element in this contract is that we had spotted a dozen applications in America of Titan, Inc. and we got a non-exclusive license to those within America, thereby adding ourselves to the number of companies that would be free to operate under those. And there isn't one word in these straightforward patent license agreements that in any way, shape or form restricts or refers to either the American or the international trade in any product or commodity.

Mr. DIXON. We wish to offer in evidence Plaintiff's Exhibit R, the same being a cross-license agreement between du Pont and Tinc dated May 10, 1940 of certain patents and patent applications.

Mr. WHITNEY. No objection.

The COURT. It will be received.

(Plaintiff's Exhibit R for identification received in evidence.)

Mr. DIXON. In this agreement du Pont grants licenses for the foreign associates of Tine on eight French, four British, two Dutch, six German, one Belgian, one Italian and ten Japanese patents or applications and receives a license on four Tine applications and three Tine patents in the United States.

521 I also direct your Honor's attention to the difference in the language of license Exhibit Q on page 451, which is paragraph 1, and also on page 453 of paragraph 2, the last paragraph, "It is understood and agreed"—

The COURT. Are you reading the same thing?

Mr. DIXON. I started with page 451, your Honor. Do you have that before you?

The COURT. Yes, but I don't see any paragraph 1 except a list of patents.

Mr. DIXON. It is in paragraph 1, the last part.

The COURT. You mean, "It is understood and agreed that purchasers from Titan and/or its sub-licenses," and so forth?

Mr. DIXON. That is right, your Honor. And that identical language is found in paragraph 2, that is, the end of paragraph No. 2 on the top of page 453. And on page 466, paragraph 1 of Exhibit R, and also on page 468, the second paragraph there ending No. 2 of Exhibit R, provides that "It is understood and agreed that purchasers" and so on "in pursuance of this license shall be free to use said products within the licensed territory". I merely wish to point out those differences to your Honor at this time.

Mr. WHITNEY. I don't get the difference. What
522 is the difference?

Mr. DIXON. That is all.

Mr. WHITNEY. There is no difference. They are just the same.

The COURT. The language omitted from the one is "within the licensed territory".

Mr. WHITNEY. Oh. That is merely draftsmanship, your Honor, because the whole contract is only a license for a particular territory. These points of the Government, with great respect, only consume time because they are irrelevant and immaterial. To grant a license, an exclusive license for Great Britain, to a British company and provide freedom to its customers. Now then, another

fellow a year later puts in "within the territory"; but there is always freedom for everybody outside the territory anyway because it was not within the license or within the patents.

The COURT. All right. Mr. Webster?

Mr. WEBSTER. I should like to make a comment, wholly unrelated to Mr. Whitney's and to Mr. Dixon's, that seems to me to be warranted by the schedule of patents appearing in here. It has been intimated, at least in the complaint and certainly at least suggested in Mr. Dixon's opening, that most of the useful patents, the patents that people would seek to make use of terminated 523 about 1935 and that from then on the art was dormant, that all of the valuable patents were secured 17 years before then and that a condition of drying up must have taken place in the inventive minds of these people. Your Honor will note on page 459 and elsewhere in these two exhibits recently referred to the list of patents which apparently these people were glad to get dated 1938, 1938 and other recent dates. In other words, there was a very active process of germination going on in the field of research.

Mr. DIXON. I wish to offer in evidence Plaintiff's Exhibit S, the same being a cross-license agreement between du Pont and Tine dated June 23, 1941.

Mr. WHITNEY. No objection.

Mr. WEBSTER. No objection.

(Plaintiff's Exhibit S for identification received in evidence.)

Mr. DIXON. We merely wish to point out to your Honor that this is again a cross-license agreement on a royalty-free basis from du Pont to Tine and its associates of four French, three British, three German, one Italian, two Dutch, one Belgian and three Japanese applications and three Tine applications and one Tine patent flowing to du Pont, with the usual privileges to grant sub-licenses to the parties named, as found in the other agreements, and substantially the same as in Exhibits 524 Q and R.

The COURT. Nothing from du Pont to Tine?

Mr. DIXON. Yes, your Honor. I thought I had pointed out—

The COURT. You mentioned only those running from Tine to du Pont.

Mr. DIXON. Du Pont gives to Tine four French, that is the licenses, and four French, three British, three German,

one Italian, two Dutch, two Belgian and three Japanese applications.

The COURT: Mr. Whitney?

Mr. WHITNEY. If your Honor please, if I may add to Mr. Webster's very excellent observation that this shows the liveliness of invention advance and development, that these applications of du Pont, seven in number, all represent six months of patent application filing between June to October—five months—of 1938. That is page 473, page 474.

If your Honor please, at page 484 there is a new paragraph that was not in the earlier agreements, paragraph 12 reading as follows:

“Governmental objection or prohibition shall be a valid plea on the part of either of the parties hereto to decline to disclose or to grant rights with respect to any invention, patent and/or application therefor which, but for such objection or prohibition, would come within the operation of this agreement.”

Your Honor will observe that the next earlier agreement had been dated the 10th of May 1940, a date world famous as the date of the invasion of Belgium, Holland and France; and, therefore, that agreement was negotiated at a time that the United States Government took a completely neutral position in the war and before the prospect or possibility of war had caused a change in Governmental attitude. The last agreement is before the United States was in the war but it is when the danger of war was upon, most in the public and Governmental consideration, June 23, 1941. And then we put in this provision that if the Government objects to the granting of any of these licenses we will not grant them.

Now the other point I want to mention, your Honor, and I don't want your Honor to feel I am addressing a legal argument on this, because I am not, I want to call your Honor's attention to what is of the least a wholly interesting coincidence—the date of this agreement, page 473, June 23, 1941, and the complaint in this action was filed June 24, 1944. Now if we were in the Criminal

Court or if we were in the Common Law Court where the New York statute of limitations on injury to property would apply, as I take it it would under precisely the same statute, and if this were the last event, as apparently it is the last agreement and I believe is the last event, that coincidence would doubtless be the main subject of discussion in this court. But being in equity of course

the question is what I might call the Bausch & Lomb question. And I merely note that in passing.

The COURT. Very well. We will now adjourn.

(Recess to 2:15 p. m.)

527

AFTERNOON SESSION

Mr. DIXON. We wish to ask defendant Titan Company, Inc. to produce the minutes of a meeting of Titan Company, Inc., dated December 12, 1929, pursuant to the subpoena.

Mr. REA. I hand you, Mr. Dixon, minutes of Titan Company, Inc. for December 12, 1929, in response to paragraph 25 of the Titan Company subpoena.

Mr. DIXON. We wish to have the same marked for identification as Plaintiff's Exhibit 49.

(Marked Plaintiff's Exhibit 49 for identification.)

Mr. WHITNEY. Only the continuing objection, your Honor.

Mr. DIXON. We wish to offer Plaintiff's Exhibit 49 for identification in evidence.

Mr. WEBSTER. No objection.

The COURT. Received as Plaintiff's Exhibit 49.

(Marked Plaintiff's Exhibit 49 in evidence.)

Mr. DIXON. Mr. Locke will continue for the plaintiff, your Honor.

Mr. LOCKE. I wish at this time, if the Court please, to have National produce a list of names with various identifications marked, called for under paragraph 8 of the subpoena.

528 Mr. REA. I now hand you, Mr. Locke, additional material that was orally requested in response to paragraph 8 of the National Lead subpoena.

Mr. LOCKE. If the Court please, it is the purpose now to offer in evidence various copies of letters, cables, memoranda and other written documents in support of, and related to, various contracts that have been introduced in evidence here. We have asked from the party the identification of various individuals whose names will appear on these documents from time to time, and they have produced them, and I would like to hand the Court a list of those names which are in alphabetical order so the Court can have before it and you can identify the positions of the various parties as we go along.

The COURT. This is in the nature of a memorandum?

Mr. LOCKE. Yes, your Honor.

The COURT. If you want to treat that as an answer to an interrogatory you can offer it in evidence.

Mr. LOCKE. Perhaps the simplest way is to offer them in evidence, if the Court please.

(Marked Plaintiff's Exhibits 50 and 51 for identification.)

Mr. LOCKE. Exhibit 50 for identification is the list furnished by National and Exhibit 51 is the list furnished by du Pont.

529 The COURT. Since you are offering each list as against both the company offering and as against the other company, I want to know about that.

Mr. LOCKE. I first offer exhibit marked 50 for identification; that is the National Lead list.

Mr. WHITNEY. We have no objection to either one, your Honor.

Mr. WEBSTER. No objection.

The COURT. Very well. Exhibits 50 and 51 are received.

(Plaintiff's Exhibits 50 and 51 for identification received in evidence.)

The COURT. You want to have me hold that for reference?

Mr. LOCKE. Yes, if the Court please.

May I proceed?

The COURT. You may proceed.

Mr. LOCKE. The Court will have comprehended by this time that commencing along in 1926 and progressing down through the years, the various parties named as defendants here and the co-conspirators and the individuals identified with them were pretty busy. These contracts were being developed, if I made that expression, contemporaneously. It has been quite a chore to so outline

530 the developments of this case that there would be an intelligent presentation of the case that we have finally decided to approach it in this way. We will take these documents which relate to, for instance, SIT, the development of that consummation and presentation of that deal, and present those to the Court first. Next we will take any documents that have to do with the purchase by National Lead of TAS; next in order we will take the documents that have to do with the development of the TG picture.

Now as we present these documents there will be references in a great many of them to two or three, and sometimes four, of the various developments that were in

progress at the time. We will hold ourselves as nearly as we can to the thought that we are seeking to develop at the particular moment.

The COURT. I take it, Mr. Locke, that these documents are not going to be presented simply from the point of view that you want the Court to have everything that was put down in writing between those dates relating to the transaction. I take it that the agreements now having been received in evidence, that their execution having been admitted, and the authority of the agents who signed for the respective companies having been acknowledged, that unless the additional written material has some bearing on intention, or purpose, or some supplemental data which is material in the case, I do not suppose that they would really become of any significance.

Mr. LOCKE. I think the Court will discover that the paragraphs we point out in the successive exhibits will serve just what purpose; to establish and develop an intention of the parties, and so on.

The COURT. Very well.

531 Mr. LOCKE. Now to save time, if your Honor please, if there is no objection, instead of having each exhibit marked for identification, I shall—

The COURT. You don't have to do that. You can have them offered in evidence in the first instance.

Mr. LOCKE. I will offer them in evidence in the first instance, and I might explain that we have submitted to counsel for du Pont copies of each one of the documents that I will offer in evidence at this time, and I think they have had them printed. I have not looked at what has been presented to your Honor but I take it that the printed pages are in the order that they were given to you.

Mr. GESELL. That is correct, Mr. Locke. They have not been paged, though.

Mr. LOCKE. We wish to offer first as Exhibit 52, photostatic copy of a letter written by one Lobstein, I am not sure of his first name, to Evans McCarty, vice-president of the United Lead Company, 111 Broadway, dated December 24, 1925.

The COURT. Is there any objection?

Mr. WEBSTER. I assume that Mr. Locke is offering the entire letter in this case. This letter is objected to as immaterial. It was written in 1925 from someone connected with the company called Societe Franco
532 Bresilienne. It appears to relate to a possibility that certain shares of the concern known as Hopkin

& Williams might be available for purchase by Mr. McCarty's company, 10,000 shares, though Mr. Lobstein tells him that another company, the Brimsdown Company in England, might be interested in these too. Now I confess I do not see the connection of that with National Lead.

The COURT. All right, Mr. Locke will oblige you and tell you. What is the connection?

Mr. LOCKE. We offer this merely because it is a foundation by way of explanation of subsequent documents that we will offer that bear directly on the purchase of the SIT stock.

The COURT. Does it grow out of this?

Mr. LOCKE. It grows out of the negotiations that were initiated at or about that time between Mr. Lobstein and Mr. McCarty.

The COURT. First of all, let us get the competent angle. Is there any objection to competence, meaning authenticity, one, and authority, two.

Mr. WEBSTER. There is no question about authenticity. There is a question about competence in the sense that it could hardly seem that statements made by Mr. Lobstein to Mr. McCarty would be competent as binding on the National Lead Company, but that is I think secondary in this case to the fact that the letter does not appear to have any connection with the issues in the case.

The COURT. Well, that he tries to cure by saying that that is subject to connection.

Mr. WEBSTER. I am not going to raise the question of competence because the fact is that Mr. McCarty does comment on this proposal in subsequent correspondence with Mr. Lobstein, so that it can't be—

The COURT. Who is Mr. McCarty?

Mr. WEBSTER. Mr. McCarty was a vice-president of National Lead Company at that time.

The COURT. Is United Lead the same as National Lead? This says United Lead.

Mr. WEBSTER. No. It is a subsidiary of National Lead.

The COURT. All right. Subject to connection I will take it.

Mr. WHITNEY. I think we will gain time if I just ask your Honor whether I may have noted the continuing objection perhaps from here on until I suggest a concession without objection, because I have read these papers and I do not find any of them whatsoever to which we are a party, and therefore I would like to submit the continuing objection throughout.

The COURT. On the ground of relevance.

534 Mr. WHITNEY. Yes. No connection to du Pont.

The COURT. And you are not raising any objection as to authenticity or authority of the party. In other words, you are not basing your objection on competence.

Mr. WHITNEY. Your Honor, quite frankly I would submit an objection both as to relevance and materiality as to the whole lot.

The COURT. I understand.

Mr. WHITNEY. But I understand your Honor's point of view on that.

The COURT. I just want to be sure that you are not founding your objection on competence.

Mr. WHITNEY. No.

The COURT. Because if you are, I will sustain the objection, as I have indicated time and again.

Mr. WHITNEY. Well, I am not.

The COURT. That is not the ground of your objection?

Mr. WHITNEY. No.

The COURT. The objection is only to relevance, and as to relevance I will have to read the document and decide that, and I will have to understand the issues in order to determine any question of relevance and I may as well read it in the record as out of the record. So I do not

535 see much point—I see a great deal of point, but I am not going to spend too much time reflecting on the question of relevance at this stage of the proceeding.

Mr. WHITNEY. I think, your Honor, it has been made clear that the objection about connection is within the realm of relevance—I was not dead certain, and my objection is simply that there is no connection to du Pont.

The COURT. Very well.

Mr. WHITNEY. May it be noted throughout on every paper—

The COURT. Very well.

Mr. WHITNEY. —as I did with the agreement, and I may from time to time point out that where we are a party—

The COURT. I understand.

(Plaintiff's Exhibit 52 received in evidence.)

Mr. LOCKE. In answer to Mr. Webster's question, if the Court please, I should like to explain that we offer the whole of each document that we present here.

Referring to the letter I have just described, I call the Court's attention only to the first and the fourth paragraphs. The first paragraph reads: "Confirming my letter of the 13th ult."

The COURT. You don't have to read it.

Mr. LOCKE. Very well. I wish next to offer
536 copy of a letter purportedly written by Mr. McCarty in response to the letter just referred to, written to Mr. Emile Lobstein, dated January 8, 1926.

Mr. WEBSTER. I make the same objection to this letter as I did to the former one, on the ground of materiality and relevancy.

The COURT. All right. I will receive it.

(Plaintiff's Exhibit 53 received in evidence.)

Mr. LOCKE. I should like to call the Court's particular attention to the first paragraph, the third paragraph and the paragraph next to the last of the document we have just introduced.

Mr. WHITNEY. Could I just call his Honor's attention to the second paragraph?

The COURT. You may.

Mr. LOCKE. I wish to offer next a photostatic copy of a confirmation of telegram. I may explain that all of these exhibits are photostats of documents taken from the files of National Lead Company, and du Pont, these particularly from the files of National Lead Company.

Mr. WHITNEY. Are there any whatsoever that you have given us?

Mr. LOCKE. Not yet.

Mr. WHITNEY. That come from the files of the du Pont Company?

537 Mr. LOCKE. Not yet. I say these particularly are from the files of National Lead.

Mr. WHITNEY. Exclusively.

Mr. LOCKE. Yes. These particular documents from the National Lead Company's files.

Mr. WHITNEY. Right.

Mr. LOCKE. This confirmation is signed "McCarty" and is addressed to Lobstein, dated January 8, 1926. It is a one paragraph telegram which I think the Court can read quickly.

Mr. WEBSTER. I make the same objection to this and I ask Mr. Locke if it is claimed that the expression "if such purchase would give control of ilmenite production" is intended to relate only to Travaucore ilmenite referred to in the first letter, because I think there is danger of considerable confusion here.

The COURT. Meaning worldwide.

Mr. WEBSTER. Yes.

The COURT. He wants to know what you contend?

Mr. WEBSTER. I wonder what your contention is to the significance of that cable.

Mr. LOCKE. Only as it is modified by the letter to which it refers, that is, Travancore.

(Plaintiff's Exhibit 54 received in evidence.)

Mr. LOCKE. We wish to offer in evidence next
538 a photostatic copy of a letter written by Emile Lobstein to Evans McCarty, dated—

The COURT. Written by Emile Lobstein?

Mr. LOCKE. By Emile Lobstein.

The COURT. That is not the next one in my document. The one I have is written to Emile Lobstein. They are not in the same order. I will find it. What is the date?

Mr. WHITNEY. It is not printed, your Honor. Apparently it was not given to us. It is one of these little mistakes that do happen. The understanding was that we were to be given all of them, and I am sure that was the intention. This one we did not receive.

Mr. LOCKE. It is a letter written by Emile Lobstein, as I said, to Evans McCarty, dated April 1, 1926.

Mr. WEBSTER. I make the same objection to this but point out to your Honor particularly that in the first three paragraphs of this letter the materiality becomes even less apparent because it appears that the shares that Mr. Lobstein first referred to had been bought by the Brimsdown Company and not by Mr. McCarty's company. And, further, in the next two paragraphs there is a reference I believe Mr. Locke will concede, to an entirely different subject, namely, the production by this company Societe
539 Franco Bresilienne of ilmenite in Brazil. This French company for whom Mr. Lobstein was writing apparently had some Brazilian ilmenite production that is referred to in the latter part of the letter which I believe is immaterial.

The COURT. I will look at it.

Mr. LOCKE. The significant part of this letter and the only one in which we are interested is paragraph 3. That has to do with the things that were discussed in earlier correspondence.

The COURT. You mean "I regret that I have not been able to secure for your group the control of our friend's deposits of ilmenite to which our purchaser attaches great importance"?

Mr. LOCKE. That is right.

The COURT. Where are these deposits to which he refers as belonging to "our friends"?

Mr. LOCKE. They belong to the Travancore Company and are the deposits from which most of the ilmenite came in subsequent years.

The COURT. I see.

Mr. WEBSTER. To show that we did not get them, or any interest in them.

The COURT. All right. I will take it. I can't be led far astray by this document.

(Plaintiff's Exhibit 55 received in evidence.)

540 Mr. LOCKE. We wish to offer next photostatic copy of a letter purported to be written by McCarty to Mr. Lobstein on April 16, 1926.

Mr. WEBSTER. The same objection.

The COURT. I understand that Mr. Whitney has the continuing objection.

Mr. LOCKE. I wish to call the Court's attention to paragraphs 1 and 2 of that letter.

(Marked Plaintiff's Exhibit 56.)

Mr. LOCKE. We wish to offer next photostatic copy of letter from Mr. Lobstein to McCarty September 24, 1926.

Mr. WEBSTER. I object to this on the same ground. The first paragraph appears to relate to advice regarding the shipment of Brazilian ilmenite and the second has to do with the directorship of the work in Brazil, and the third to the chart of the Harbor of Guarapary which is referred to here and the last seems to do with the relationship of the Auer Company to Franco-Brazil with reference to rare earths products. I submit the connection of Auer with our case is very remote.

The COURT. Do you see anything less remote than Mr. Webster?

Mr. LOCKE. If the Court please, in paragraph 30 of the complaint the Auer patents became involved in this
541 proceeding. We offer the last paragraph of this letter merely as evidence of the time when the parties first became interested in the Auer situation, as we described it for short.

The COURT. The Auer Company is the Brazilian company?

Mr. LOCKE. No.

The COURT. I did not mean what you meant. I meant "our" company. The word "our" in the last paragraph refers to the Brazilian company?

Mr. LOCKE. That is right.

The COURT. The Brazilian is a subsidiary of SIT?

Mr. LOCKE. No.

The COURT. Is there any relationship between the Brazilian company and SIT?

Mr. LOCKE. Lobstein had an interest in it I see at or about the time this exchange of correspondence was taking place. Eventually Lobstein sold that stock.

The COURT. Subsequently Brazilian became absorbed in SIT?

Mr. LOCKE. No, if the Court please. It was merely a stock transaction; a transfer in the stock in SIT ultimately to National Lead Company. Lobstein at that time, rather his company, the Brazilian company here in 542 1926 owned that stock or were interested but eventually transferred it to the National Lead.

The COURT. All I see in this letter is that the Franco-Brazilian Company, which I have heard mentioned here before, but I now fail to see any connection to the parties here—I thought I knew some connection but apparently it escapes my mind—says they are completing an agreement with the Auer Company to stabilize the price of "our rare earths products", whatever that might be.

Mr. LOCKE. I see we make mention that in the last paragraph "Auergesellschaft" comes into the picture.

The COURT. Comes into what picture? It does not come into the Brazilian picture:

Mr. LOCKE. No, not necessarily. The Court will recall I said there would be times when there would be an overlapping.

The COURT. Here is what I mean: Suppose there was a letter written by Beth Webster in 1927 to Dwight Whitney back in 1927, just as they were emerging from and entering their Governmental activities in which one said to the other, "I think this Auergesellschaft is going to do something," and the word "Auergesellschaft" is mentioned. I should need a stronger authority to make it relevant to the issues.

543 Mr. LOCKE. I say, if the Court please, as we progress we find the name "Auergesellschaft" is referred to again and again and again.

The COURT. I have not any doubt. I remember seeing about Auer agreements.

Mr. LOCKE. They owned certain patents and certain inventions that had to do with the titanium compounds which were eventually purchased by du Pont.

The COURT. I follow all that, or I do not follow here an exchange of letters between a man named Lobstein, an officer of an unrelated company, with the Franco-Brazilian

Company, with a man named McCarty, who is a vice-president of a subsidiary of National Lead, in which he mentions "Auergesellschaft" becomes relevant.

Mr. LOCKE. It becomes relevant for this reason: It establishes, following the other correspondence which refers to the same company, the position of Auergesellschaft in that production of titanium and titanium compounds in Europe which might have some bearing.

The COURT. I don't want to take too much time. I am taking this one on faith, so don't exhaust your credit at the bank.

(Marked Plaintiff's Exhibit 57.)

Mr. LOCKE. We offer next photostatic copy of a letter purportedly written by McCarty to Lobstein dated
544 October 8, 1926, and we wish to call the Court's attention to the last paragraph of that letter.

Mr. WEBSTER. He suggests to him that he might be interested in sharing control of the Brazilian Company with Mr. Lobstein, is that right?

Mr. LOCKE. That is the implication, yes.

The COURT. Did that ever happen?

Mr. LOCKE. No, your Honor.

The COURT. Did Franco-Brazilian Company ever enter into this picture?

Mr. LOCKE. They are not referred to in the complaint. The fact of the matter is that the Brazilian Company did furnish to National Lead ilmenite that was produced in South America.

Mr. WEBSTER. You could carry it in your shirt-tail, Judge; a relatively few pounds and of no importance and they had a hard time getting it because they never got that charter for Guarapary.

The COURT. I think we are doing just what I thought we would do and which I hoped we would not do, which is to make a very complete record of all the correspondence that passed between everybody in which certain key words were mentioned, like one of these clipping bureaus that print newspaper items wherever a name is mentioned. But

I am having the greatest trouble in visualizing just
544-A how this letter is going to propel me one way or the other in the direction of finding violation or no violation, and after all it says that is the test of relevance and materiality.

I am trying to visualize and take a little more time on this now because I am afraid we will have a great deal more of this, and maybe you ought to re-examine this

whole folder and see what you really need.

545 Mr. LOCKE. I can promise the Court there won't be much of this. There are a few letters in the early part of this proceeding. The others are closely related and identify themselves very quickly.

The Court: I am trying to visualize what I can learn from this letter, and I learn that the parties, an officer of a subsidiary of National Lead, and I am willing to leap across the chasm and say he is writing for National Lead—all right—and he writes Lobstein that he would like to acquire, presumably for National Lead or for United Lead, one or the other, a substantial interest in Franco-Bresilienne. Then I know from what you have told me, although it does not appear in the letter that that actually never happened. So why does that move me in the final picture or even in an intermediate stage of the final picture?

Mr. LOCKE. Only to this extent, if the Court please: The Court might be interested in the titanium situation as it existed at the time this letter was written. The titanium situation includes the development of the ore from which titanium was made; it includes the negotiations that led up ultimately to the purchase in this particular interest of SIT stock of National Lead Company, and shows the contents of the parties who eventually consummated the deal.

546 The COURT. All right. I will take it.

(Marked Plaintiff's Exhibit 58.)

The COURT. The danger involved in doing that is that when you hand a trial court or an appellate court so much reading matter it naturally tends to subtract from the amount of time that the judicial agency can give to the documents which are really strongly probative. However, let us go on.

Mr. LOCKE. We offer next, if the Court please, photostatic copy of a letter written by Lobstein to McCarty, dated October 22, 1926, and calling the Court's attention to the second paragraph of the second page of that letter.

The COURT. "I answer to the part"?

Mr. LOCKE. Yes, if the Court please, and the last paragraph of the letter.

Mr. WEBSTER. Perhaps I can shorten this by calling your Honor's attention to this: I have attempted, your Honor, over the week-end, to go through, for the second time, several hundred pages of letters and it takes me a moment to refresh my recollection of what they contain;

but now that I see this, I remember it. Mr. Lobstein advises Mr. McCarty that they now have some word from a director down there in Brazil about the works down there and that the war situation is improving somewhat and that efforts are being made to get small steamers into that harbor and then over here in the paragraph to which Mr. Locke particularly directs our attention now he says, "In our meeting of 28th July last, I mentioned to you the rather important purchases made by an American bank and that it seemed likely to me that your company and Auer Company alone were interested in these purchases."

Now I submit to your Honor that speculation by this man on the question of possible interest in these shares is utterly immaterial. The rest of this just goes on and talks about things that have no connection with the case.

Mr. LOCKE. I have no further reasons for offering it than those I gave your Honor for offering the previous ones.

The COURT. All right. We will take it today. (Marked Plaintiff's Exhibit 59.)

Mr. LOCKE. We wish to offer next a photostatic copy of a letter purportedly written by Mr. McCarty to Lobstein, dated November 3, 1926, and calling the Court's attention only to the last paragraph of that letter.

Mr. WEBSTER. Of course while Mr. Locke is calling your Honor's attention to only one paragraph in here he quite frankly stated that he was offering in each case the whole letter, and therefore if I do my full duty to my client I cannot overlook provisions which he is not at the moment emphasizing. My attention having been called to this again, I find that Mr. McCarty further is speculating in this interesting correspondence he is having with Mr. Lobstein; he thanks him for the documents and says that he has not been able to give them the attention that their importance warrants and that he cannot therefore give him a quick decision. He again regrets that this chart has not arrived for the harbor of Guarapary and then comments again on the delay of Mr. Barrozo in getting back there to look after the production, and then I find the thing Mr. Locke is really talking about is simply Mr. McCarty's comment: "Thanking you for your suggestion with respect to the possible purchase of a block of shares in your company, a matter to which I will return at the first opportunity."

The COURT. That is the purchase that never happened?

Mr. WEBSTER. That is the purchase that never happened; still speculating.

Mr. WHITNEY. If your Honor could compare this with Exhibit 50, I observe possibly Mr. Lobstein and Mr. McCarty have this great advantage over us; that they
549 are both long since deceased.

The COURT. All right. I will take it.

(Marked Plaintiff's Exhibit 60.)

Mr. LOCKE. We wish to offer, if the Court please, a photostatic copy of a letter written by Mr. Jebson to Evans McCarty, dated March 4, 1927, and we wish to call the Court's attention to the first paragraph on page 1, and the second paragraph on page 3.

The COURT. Do the paragraphs and pages correspond to the print?

Mr. LOCKE. I thought they were to be set up in print just the way they were here.

Mr. O'DONNELL. They are not page for page.

Mr. WHITNEY. Why not give the opening words of each paragraph.

Mr. LOCKE. There can be no question about the first paragraph. The fifth paragraph of the letter which starts "But anyhow, the result was" etc. The ninth paragraph which starts "However, if we are not able," and the tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth paragraphs.

The COURT. I find no such paragraphs.

Mr. LOCKE. They are not numbered.

The COURT. I cannot find paragraphs that begin with the words you indicate. Let us go back to the
550 paragraph beginning, "But anyhow, the result was". Where is the next one?

Mr. LOCKE. The fourth paragraph following that.

The COURT. "However, if we are not able"?

Mr. LOCKE. Yes, if the Court please, and then the successive paragraphs "In order" and "In favour".

Mr. WEBSTER. And all the rest of it?

Mr. LOCKE. That is right. "Against the continued co-operation," and the paragraph marked (2) "Mr. Lobstein is a man of 76 years," skipping the next, and the next paragraph, and then "We have nobody able to take the whole management," and the next paragraph which starts, "It will though mean a slower development," and the following paragraph which reads "During my negotiations," and the next seven paragraphs.

The COURT. Beginning with the words "I have been trying"?

Mr. WHITNEY. The signature, your Honor, is a mistake. It is illegible and the printers thought apparently it was Lobstein, but it was Jebesen.

Mr. LOCKE. The last paragraph to which we refer starts "I have been trying to give you the position."

The COURT. Is there any objection to that?

Mr. WEBSTER. Your Honor, I think I should warn your Honor that Dr. Jebesen was a very thorough man
551 and he wrote very long letters and he was particularly zealous to try to explain to his American friends what things were all about, and this is one of his very long letters. Now I submit that it is improper to ask your Honor to consider fifteen paragraphs out of 30 or 35 and that it does not get us anywhere. What is going on here in this letter, if I may attempt, on the basis of what I have remembered about it, if he finds himself having some rather unsatisfactory relations with Lobstein, and Lobstein's associates in France.

The COURT. Where is Jebesen then? Is it still at that time in the TAS?

Mr. WEBSTER. Yes. Jebesen is the head of or manager of the TAS.

The COURT. He has not come over to American yet?

Mr. WEBSTER. Well, he was over here in 1920, but this is 1927.

The COURT. I mean he is not in any position with any American company.

Mr. WEBSTER. No, none whatever. Now he is having difficulty with his sales situation in France and one of his problems, his problem children, is Mr. Lobstein, and he says that Mr. Lobstein not only is a problem child but a
552 problem child of second childhood; he is 76 years old and he is not enthusiastic about titanium products as Dr. Jebesen might wish he would be, but he is only interested in the metal business and he puts it up to Mr. McCarty to say "What do you think we ought to do about Lobstein and his crowd?" The fact is, this rather comes to nothing because Jebesen sums it all up by stating the advantages on each side so convincingly that he leaves himself unconvinced and the result is complete confusion. I suppose these are being offered against us as proof of a conspiracy, and it is all right to be pleasant about it for a while, but it gets to a point where we think Mr. Locke ought to tell us what this letter contains that shows we

were parties to the conspiracy alleged in this complaint.

The COURT. Anything you want to add, Mr. Whitney?

Mr. WHITNEY. No, thank you, your Honor.

The COURT. What is this letter all about, Mr. Locke, from your point of view?

Mr. LOCKE. It is a further delineation of the picture I described. It has to do with the purchase of the stock Mr. Lobstein owned, and background for the subsequent developments all having to do with the conspiracy, if the Court please, Mr. Webster's interpretation is very interesting but I think the letter should speak for itself.

Mr. WEBSTER. Then why don't we read the letter?
553 The COURT. Of course you understand, Mr.

Webster, my attention having been called to specific paragraphs does not mean that the Court is not privileged to read the entire letter, and of course will. The point is, Mr. Locke feels these paragraphs contain the meat of this very lean stew.

Mr. WEBSTER. I accept that characterization and can rest on that as the basis of my objection.

The COURT. I will take this. I suppose I will take a few more today, but I give fair warning now that I am going to adopt a more rigid attitude in this matter tomorrow, so that counsel can reexamine during the evening each of these documents they really regard as pertinent. That does not mean if you identify all the others I might not receive this one and the Court might not sustain its reception on the theory that it supplies background, but when you have so much background, why load it down with very remote communications. If you feel that there is something to be extracted from it I will be glad to see it, but so far in practically all the exhibits from No. 52 on, I have found very little meat.

Mr. WEBSTER. May I ask Mr. Locke—perhaps this is an inappropriate place to raise the question, but I have a marginal note on my page of this—if he offers the marginal notes as well?

554 The COURT. The marginal note does not seem to have been printed.

Mr. WEBSTER. I have not the printed copy.

Mr. LOCKE. Answering Mr. Webster, if the Court please, it is not our purpose to have the marginal notes considered as part of the exhibit.

(Plaintiff's Exhibit 61 received in evidence.)

Mr. LOCKE. If the Court please, we wish to offer in evidence now photostatic copy of a letter purportedly

written by McCarty to Jebesen, dated March 18, 1927.

Mr. WHITNEY. There were three pages annexed to the next previous exhibit, in French.

The COURT. I was just going to inquire about that. Is that offered?

Mr. LOCKE. No, that is not offered.

Mr. WHITNEY. I only appeal to the Government. This sort of thing is quite expensive.

The COURT. I will take it.

Mr. WEBSTER. Have you offered the one March 18th?

Mr. LOCKE. Yes.

Mr. WEBSTER. If your Honor will bear with me, if we look at this a moment, we have to recall what this is all about.

555 Mr. WEBSTER. Your Honor, I make the same objection. It is just a lot of speculation about things.

The COURT. My respect for Mr. McCarty is rising, however. He comments that it will take quite a while to digest this Jebesen letter.

Mr. WEBSTER. Also he says, "The situation is quite complicated, as you say."

The COURT. Well, all right. Plaintiff's Exhibit 62. (Marked Plaintiff's Exhibit 62.)

Mr. LOCKE. I wish to offer in evidence photostatic copy of a letter purportedly written by McCarty to Jebesen dated November 4th.

The COURT. What about October 2nd? You are not going to follow that—

Mr. LOCKE. I don't have October 2nd. I am not familiar with what that letter is. It may be that that will be offered at some subsequent time in the proceeding, if the Court please.

Mr. WEBSTER. On your list it is the next one in order.

Mr. LOCKE. Well, this does not follow exactly the subpoena list so you can't check from that. It follows the list that we gave you, however.

Mr. WEBSTER. We did not have any such list. 556 We spent the last three or four days reading the list that we thought we got from you.

The COURT. What is the next one?

Mr. LOCKE. November 4, 1927.

The COURT. It will be impossible to find it here.

Mr. LOCKE. It appears as item 24 in the National Lead subpoena.

Mr. WHITNEY. That has not been printed, your Honor; it was not handed to us by the Government.

Mr. LOCKE. In this letter we wish to call the Court's attention—

Mr. WHITNEY. Wait a moment. We haven't seen it.

Mr. WEBSTER. It is McCarty to Jebson.

Did you make your offer?

Mr. LOCKE. Yes.

Mr. WEBSTER. If your Honor has looked at this letter

The COURT. I haven't yet. Where is the exhibit?

(Handed to the Court.)

The COURT. You will have to tell me about it.

Mr. WEBSTER. I will be glad to tell you a few words about it. Apparently Mr. Pisart who is referred to in the first paragraph was an acquaintance of Mr. McCarty's and Mr. Pisart was in business in France and he came to see Mr. McCarty and talked to him about some zinc
557 oxide paste and told him that they had certain grinding facilities at a Belgian company named Stella. And then there was some reference in here to a possible conflict between lithopone and titanium pigments which was the conflict that certainly developed and resulted in the defeat to a large extent in the United States of lithopone; but apart from that, and even including that, it seems to not bear on the issues of the case.

The COURT. Mr. Locke?

Mr. LOCKE. I wanted to call the Court's attention to the seventh paragraph of the letter which discusses the conflict of interest between lithopone and titanium. That becomes a material issue in this case. And we offer it at this time because this is the first time that in the correspondence there is any mention of—

Mr. WEBSTER. Oh, excuse me. I thought you had finished.

Mr. LOCKE. We offer it also because there is reference to the IG situation which had by that time developed, and we offer the last paragraph of the letter because it treats with the purchase of SIT—or, rather, we offer the whole letter, if the Court please, and call the Court's attention to those paragraphs.

Mr. WEBSTER. In view of the complaint here I would like to ask Mr. Locke and his associates right
558. now if it is contended that this case includes the lithopone business, because if it does it is the first intimation we have had that any such point would be made. There is a reference in the letter to the IG but it is an entirely obscure reference, and as far as Mr. Pisart is concerned we never made any arrangement with him about

titanium pigments and the letter does not seem to refer to the case at all.

The COURT. I will receive it. And the first thing tomorrow morning at 10.30 I will consider applications for the striking out of any of the exhibits beginning with I think No. 52. At that time I will expect the Government to be able to show me wherein any of these documents are relevant to the issues, because, as I told you, I was taking some of them on faith and I suggested that you do not overdraw on your account. But I am unable to follow these documents as having any relevance to the issue. Maybe they are relevant and maybe I do not comprehend the issues of the case. That is what I want you to be prepared to show me tomorrow morning. For the present I will take them, receive them and have them marked, and if we strike them out they will be marked for identification.

(Marked Plaintiff's Exhibit 63.)

550 Mr. LOCKE. We wish to offer next copy of a letter from Jebson to McCarthy dated April 8, 1927.

It is No. 48 on the subpoena.

Mr. WHITNEY. If you take what we have already read, your Honor, as about one-third we are now one-third of the way through, and this letter isn't anywhere in there.

The COURT. I won't try to find it. It is impossible to try to find individual letters in a book which hasn't got any numbered pages.

Mr. WHITNEY. There is some little mistake because the understanding was that our friends would give us the exhibits, we at our expense would print them and then, as they said, we would always be ahead and your Honor would have a printed copy and we would go on.

The COURT. It has been very convenient.

Mr. WHITNEY. And we printed them precisely in the order in which they were given. I suppose there has been a little mistake or a change of mind or something but that is —

The COURT. We are going to solve that problem very simply. I am going to return this printed material to Mr. Locke and he is going to change the order of the printed documents that are unbound in the order in which he intends to present them, then we can make some speed and we can have material so that all of us can look at it at the same time. Otherwise it will be an endless task.

560 Mr. LOCKE. I would like to have the Court know that we not only gave Mr. Whitney's office copies, photostatic

copies, but before they were turned over they were checked with this file from which I am reading now and they were handed to Mr. Whitney's printer.

The COURT. In the same order?

Mr. LOCKE. In the order in which I am presenting them. I don't know where the mistake occurred. I don't know where the confusion has arisen. This order has been established for some time, it has not varied, I haven't made any insertions nor have I made any deletions in the documents.

Mr. WEBSTER. Your Honor, we had a list of 70 or 75 documents given to us by Mr. Locke on which we spent two or three days and arranged those in order. We could keep ahead of this if we can follow a list of some sort and read them the night before.

The COURT. If you had the printed book.

Mr. WEBSTER. Or if we had the printed book. But otherwise we can't keep up with them—

The COURT. You might find, Mr. Locke, that there has been some very bulky interchange, that is, a whole section of stuff may have been put in the wrong place which, if you examine the printed material, you
561 may be able to restore in the proper order.

Mr. LOCKE. May I suggest that at the end of each day I will be very glad to sit down with counsel and give him the rest in the order in which the documents appear on the subpoena so that he can that night take those documents out and find out in what order they will be presented to the Court.

Mr. WHITNEY. That is not practical because the printer has to print them the day before. We have to be at least a day ahead.

Mr. LOCKE. You will be three or four days ahead in your printing.

Mr. WHITNEY. Good.

Mr. LOCKE. I am suggesting that we get together the night before with the printed documents and compare them.

Mr. WHITNEY. Right.

The COURTS. We will take a short recess.

(Short recess.)

Mr. LOCKE. We wish to offer next, if the Court please, copy of a letter from Jebson to McCarty dated April 8, 1927.

The COURT. I thought that was offered.

Mr. LOCKE. It has not been marked yet. I just wanted

to refer to it again.

562 Mr. WEBSTER. Has that one been received?

Mr. WHITNEY. I have never seen it. I object to it upon the ground that I have never seen it.

The COURT. I thought that was the one we had our discussion about.

Mr. WEBSTER. No. That was 63.

The COURT. April 8, 1927.

Mr. WEBSTER. We had a discussion about the procedure. We did not have a discussion about the letter.

The COURT. All right. You may examine it.

Mr. WEBSTER. I have examined it. This is April 8, 1927.

Mr. WHITNEY. Is that the one that was up for discussion before the adjournment?

Mr. WEBSTER. Yes, but it has not been offered.

There is one point I would like to refer to just in passing. Dr. Jebesen has the habit at this time in these letters of referring to Titan A/S as Titan Co. That was before the incorporation of the American Titan Company, Inc., so that Titan Co. in here means Titan A/S.

Now apart from that mechanical detail this relates to a proposed trip of Mr. McCarty's to Norway in connection with the taking over by National Lead Company of its shares which it was then purchasing in Titan A/S, and

563 reference is made in here to a concession that had to be obtained from the Norwegian Government before stock in a company that operated natural resources could be turned over, and your Honor will find, if Mr. Locke insists on offering all of these letters, many references to that which have nothing to do with the case.

There also is a reference here to Mr. Hallett—that is, Mr. Hallett is a man connected with the engineering department of the Lead Company and he wanted to go over to see what the mine in Norway looked like. Also, there are references to bookkeeping suggestions and that sort of thing. Dr. Jebesen, whose thoroughness is unparalleled, slips into some curious expressions. He used the expression here in one place which I think indicates having near him a Norwegian-English dictionary: He speaks of the "raw-balance" which I assume means trial balance which is made up every month.

Now I don't think any of those things are in the case. If they are, I would like to have them pointed out to us.

564 The COURT. May I look at the exhibit?

(Exhibit handed to the Court.)

Mr. LOCKE. If the Court please, I explained to the Court when we started off with these documents that almost all of them treat with one, two, and sometimes three different phases of this picture. They treat with the TG situation; they treat with the SIT situation; they treat with the purchase of Titan stock; they treat with the organization of Tinc and so on. I am offering the whole of each one of these letters as I do, pointing out the particular paragraph in the letter that I am offering that have to do with the subject that I am attempting to develop at the time. This particular letter has some relevancy to the negotiations that eventually resulted in the formation of TG. That appears in paragraph marked 3 in the second page of this exhibit, referring to conferences with Dr. Kuhne, who turns out to be one of the negotiators in the TG deal. Paragraph 4 has to do with the purchase of SIT stock. Not any one paragraph is sufficient to be of any great moment, but it has some importance in putting together the pieces of this crossword puzzle that each and every one of these different enterprises is.

I shall be very glad, if the Court would prefer it that way, to offer only that part of any given letter 565, that has to do with the particular problem that we are developing. I think this would be a more expeditious way, so that having offered this particular document dated April 8th for the purpose of establishing proof in connection with SIT when we began to develop the TG picture I would again refer to that exhibit and point to the paragraph that had to do with that problem.

The COURT: Plaintiff's Exhibit 64 is received in evidence.

(Plaintiff's Exhibit 64 marked in evidence.)

Mr. WHITNEY. Your Honor, could I just say my only interest on behalf of du Pont Company is to save some time and expense and in that interest I would just like to suggest to your Honor and to our friends for the Government that this problem isn't a problem of painting the entire picture in every detail. I would be grateful to have Mr. Locke's attention.

Mr. LOCKE. I am listening, Mr. Whitney.

Mr. WHITNEY. It is a matter of proving the first three sentences of paragraph 45 of the complaint.

Paragraph 45 describes these IG contracts and after the first three sentences it summarizes the contracts which

have already gone into evidence; and the points of the first three sentences are that IG conducted extensive development work, that National believes, because 566 of IG's inventive power and great resources, that it would develop into a serious competitor, and that National made this deal in order to eliminate that competition.

If he has any letter that goes to any of those three issues that would be relevant and material. All these other things are irrelevant and immaterial, and although we are a big company we have stockholders, public stockholders; and they have to pay our expenses. We also say we are taxpayers for Mr. Locke.

The COURT. All right.

Mr. LOCKE. We wish next to offer, if the Court please, photostatic copy of a letter which purports to have been written by McCarty to Cornish, president of National Lead Company, dated June 18, 1927.

Mr. WHITNEY. I received this and I have a printed copy. I object to it on the ground that there is no signature, and I object to it upon the ground of authenticity. I am simply tired of making an offer to the Government to try to cooperate and have them not even answer, reply or pay any attention. After all, we are supposed to be lawyers admitted to the bar because we have made some study of law, trying to try a case to your Honor about relevance and materiality and the issues of the complaint, and there are five of us here from our company. We

567 have nothing to do with any of these papers. There isn't one single one of 150 of them that come out of our files. There aren't five references to our company in the whole 150. And in the interest of our stockholders I object to this exhibit upon the ground it has no competence.

Mr. WEBSTER. I am not going to object to this letter, your Honor, and after it is received, if it is received, I would like to read portions of it to the Court.

The COURT. I haven't seen the letter.

(Letter handed to the Court.)

The COURT. All right. Now first let us get disposed of the objection as to competence. How about it, Mr. Locke?

Mr. LOCKE. If the Court please, in many conferences we had trying to get up a stipulation here—

The COURT. A stipulation does not govern Mr. Whitney.

Mr. LOCKE. I want to finish by making this statement,

if the Court please. (Continuing) We were assured by Mr. O'Donnell that if, as and when, the National Lead Company waived any objection because of authenticity under paragraph 4 of the stipulation which provides that the offer of any unsigned document, copy of a letter, so on and so forth, when the National waived any objection thereto that du Pont would not raise any objection. Mr.

Whitney gave us the same assurances two or three
568 times in the many discussions that he has offered here on the science of trying a lawsuit and listed many other things. We are not prepared because we have relied on those assurances to make further proof than that which satisfies National Lead Company as far as documents received and taken or available in their place.

Mr. WHITNEY. It is not a question of that. Who wrote this letter? There isn't a word on it to indicate it.

Mr. LOCKE. I have made the representation that McCarty wrote it. We gather that impression from reading all of the correspondence here, if the Court please, and it seems to satisfy the attorneys for the National Lead Company.

Mr. WHITNEY. Do you represent that McCarty wrote it?

The COURT. That is what I take it to be.

Mr. WHITNEY. He said he gathered that impression.

The COURT. He is now representing it.

Mr. LOCKE. We represent it.

The COURT. He is offering this as a letter—

Mr. WHITNEY. I will withdraw my objection, simply commenting that both of these gentlemen are long since
569 dead, and the letter is date 17 or 18 years ago, and we are not mentioned in it.

The COURT. All right. I take it that the objection as to competence is withdrawn; Mr. Whitney has a continuing objection, Mr. Webster has no objection, and the exhibit will be received as Plaintiff's Exhibit 65.

(Plaintiff's Exhibit 65 received in evidence.)

The COURT. Do you want to make some comment on it, Mr. Locke?

Mr. LOCKE. I just want to call the Court's attention to the third and fourth paragraphs on page 2 of the exhibit that has been offered.

Mr. WEBSTER. May I read this? I would like to read portions of this letter to the Court.

The COURT. All right.

Mr. WEBSTER. Inasmuch as each of these documents is received complete I think this bears on some things that

were discussed this morning. Mr. McCarty wrote this letter to Mr. Cornish and summarizes a number of matters, and I think quite well.

(Mr. Webster read the first three paragraphs of Exhibit 65.)

Mr. WEBSTER. (continuing reading). "The 'Titanium' Company—that in this letter refers to Titan A/S—

570 (Mr. Webster continued reading to the second paragraph on page 2 of the exhibit as follows:)

"To give an account of the day would be rather a long undertaking which I will defer until my return. Mr. Warburg"—I think I may say Mr. Max Warburg is a German banker in Hamburg with whom the National Lead Company had business relations [continued reading, reading the third paragraph on page 2]. I think I might say parenthetically there that the Societe there referred to is the Lohstein concern that has previously been mentioned.

(Mr. Webster completed the reading of Plaintiff's Exhibit 65.)

The Court. All right. It is marked Plaintiff's Exhibit 65.

Mr. LOCKE. We wish next, if the Court please, to offer in evidence letter which purports to have been written by McCarty to Jebesen, dated August 18, 1927, together with enclosures found with that letter, one being a confirmation of telegram from McCarty to Jebesen, dated August 17th, the second a telegram from Jebesen to McCarty, dated August 3, 1927. With reference to these we wish to call the Court's attention to the confirmation of telegram dated August 17th and to the second paragraph on page 2 of the exhibit offered.

571 Mr. WEBSTER. We do not seem to have the telegram dated August 17, 1927 which is attached to the document, but we have no objection to this, except to point out to your Honor that if your Honor receives it there are one or two things we would like to call attention to.

The Court. It will be received. Plaintiff's Exhibit 66. (Marked Plaintiff's Exhibit 66.)

The Court. Now, Mr. Webster, you wanted to make some comment.

Mr. WEBSTER. Yes. I suppose Mr. Locke has in mind the details of the acquisition by the Lead Company of—the interest that it had at least, financed in TG and the SIT, but the last paragraph of the letter I think is quite interesting to the Court in view of the charges here:

"You will be interested to learn"—this is McCarty advising Jebesen—"that the price of Titanox in the United States has been reduced to ten cents per pound." I haven't yet confirmed the exact figure, but I am in the process of doing so. It was very much higher. Seven years later they made this reduction. "It is however, too early to tell what effect this reduction will have upon the volume of the sales. I am arranging to send a small
572 shipment of Titanox to Greeff & Company in London as Mr. Thompson"—Mr. Thompson was the managing director of Greeff—"is very anxious to have some of our product there to submit to certain customers for trial."

In other words, they were carrying out the plan for exchange of know-how and exchange of experience and getting from Thompson, this British agent, the English experience under English conditions and climate of Titanox. "I do not know just what price I will be able to arrange with Mr. Meredith"—Mr. Meredith was the head of Titanium Pigment Company who was the first party to that 1920 agreement—"but will advise you later when the matter has been settled. As the first shipment will probably not exceed five tons the price is not really a great matter."

Subject to correction, the price had come down at least from 18 cents to 10 cents in seven years. There is a reference in here to the fact that certain transactions have been authorized by the Norwegian Creditbank because of Jebesen assuming personal responsibility, and that gives me an opportunity to say what I have not said before: that this correspondence shows that Dr. Jebesen was not only a very thorough man but as I think any fair-minded reader will conclude after he has seen all of this evidence a very honest man.

573 Mr. LOCKE. We wish to offer in evidence the next exhibit if the Court please, a photostatic copy of a letter written by Jebesen to McCarty dated September 6, 1927. We wish to call the Court's attention particularly to the third paragraph on the first page thereof, the third paragraph on the second page thereof, and the first paragraph on page 4.

Mr. WEBSTER. Just a moment.

Mr. WHITNEY. We haven't got it. September 6, 1927?

Mr. LOCKE. That is right.

The COURT. I can't read this now, but will you tell me something about it.

Mr. LOCKE. This has to do with the relationship between Lobstein and the Franco Bresillienne and the SIT, if the Court please. There is some discussion about control of the ilmenite market. That is about all there is in there that I have referred to.

The COURT. Any objection, Mr. Webster?

Mr. WEBSTER. Yes, I have an objection. I will have to look at this for a moment.

574 Mr. WEBSTER. Well, there is a great amount of material, as others have indicated, in any letters of Dr. Jebesen, so-called longer letters, and I think the references in here to Franco Bresilienne are very nicely summarized in Mr. McCarty's response to Dr. Jebesen, which Mr. Locke has not offered in evidence and which I adopt as my own summary of all of that material relating to the Franco Bresilienne agreement:

"I have your letter of September 6th, and am interested in the extracts from the contracts with the Franco-Bresilienne."

Mr. LOCKE. May I interrupt. I will offer that as my next exhibit.

Mr. WEBSTER. Then I can refer to it.

"Apparently the Titan Company or the Societe Industrielle du Titane has a call or option on the ilmenite produced by the Franco-Bresilienne, and in no case can the latter company sell its ilmenite elsewhere at a lower price than cost plus 25 plus per cent."

That is Mr. McCarty's summary of Dr. Jebesen's extracts from the agreement.

Moreover, the Franco Bresilienne property in Brazil is a relatively puny affair. We never acquired control

of it. We never had anything to do with it. We
575 never got that map of the harbor at Guarapary, and except for the shirt-tail full of ilmenite, that never amounted to anything in our lives, and is completely irrelevant.

Now there is a section of this letter, later on, after Dr. Jebesen refers to his meeting with Mr. Thompson of Greeff in Paris, and that five tons of ilmenite being sent to London for test purposes and the price, etc., he then comments at great length upon some gossip that apparently had been received by someone over in IG from someone in the United States about a possible ilmenite or titanium project other than the National Lead in this country. It is sheer gossip, rumor, hearsay, several times multiplied, and mentioned by me really because I hate to be caught by a trap

if this whole letter is received. And then it contains things that my friend Mr. Locke inadvertently prefers not to mention but may remember to mention later.

The COURT. All right.

(Plaintiff's Exhibit 67 received in evidence.)

Mr. WHITNEY. I would like to submit to your Honor that this letter seems to me reasonably characteristic of all that have gone theretofore and one point seems important to us. Here we are in September 1927, the period of the

IG agreement, and the full flood of whatever it is 576 that is being charged, and here we have a great long letter followed with the names of all these various companies and discussing the titanium situation and the ilmenite situation throughout the world. Now if du Pont were in this, they would be mentioned in that letter. That is my comment.

Mr. LOCKE. We wish now to offer photostatic copy of a letter that purports to have been written by McCarty to Jehsen, dated September 23, 1927, and wish to call the Court's attention only at this time to the first paragraph of that letter.

Mr. WEBSTER. I object to it as irrelevant and immaterial.

The COURT. What does he mean by the "Titan Company" in the third line?

Mr. LOCKE. If the Court please, that is Titan A/S.

The COURT. Is there any comment?

Mr. WEBSTER. No, I do not think so, your Honor.

The COURT. All right. We will receive it as Plaintiff's Exhibit 68.

(Plaintiff's Exhibit 68 received in evidence.)

Mr. WEBSTER. I assume if I do not fully state my objections to each of these it will be taken as having 577 been already stated.

The COURT. I have already indicated that tomorrow morning I will consider seriously if a motion is made to strike a great many of these exhibits, including 52. In the meantime, does anyone want to take the task of arranging this printed exhibit in the order they are to be offered or are likely to be offered tomorrow.

Mr. LOCKE. I would suggest to the Court that we may have that together with the other copies that have been distributed put together and see if we can arrange those.

The COURT. That will expedite the movement of this tremendously.

Mr. LOCKE. I can offer no explanation for the confusion.

The COURT. Well, see what you can do about rearranging those this evening.

We will now adjourn until tomorrow morning at ten-thirty.

(Adjourned until Tuesday, December 12, 1944, at 10:30 a.m.)

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, December 12, 1944, 10.30 o'clock a. m.

Trial resumed.

Mr. WEBSTER. May it please the Court, I think we are all sometimes disappointed by the form that what we said yesterday takes in today's transcript.

The COURT. That is a form of disappointment that I experienced many a time.

Mr. WEBSTER. It sometimes appears without punctuation, all flattened out, and the winged words killed by a Dictaphone. I think only Mr. Churchill gets adequate reporting. Some of these corrections can wait, but there was one that appeared yesterday that I think might trouble my friend and client, Dr. Jebsen, and I would like to correct it, if I may.

On page 574 I am reported as saying:

"Well, there is a great amount of material, as others have indicated, in any words of Dr. Jebsen, so-called Junker letters."

Now I think that Dr. Jebsen would be disturbed if he thought his counsel was referring to anything he did as Junker, and I don't know exactly what I did say, but I am sure I did not say that.

Now on the next page I resorted, I regret to say, to extreme colloquialism.

The COURT. I think you said "so-called longer letters."

Mr. WEBSTER. I may have said just that, your Honor. I referred to a shirt-tail full of ilemenite. I am reported as referring to a "shirt-tail pool of ilemenite." There may be other sorts of pools in this case, but I don't believe there is a shirt-tail pool.

There is one other mistake I would like to mention, in Dr. Jebsen's behalf. In my discussion early in the morning I referred to Dr. Jebsen's creditors when I was talking about the condition of Titan Company A/S. Of

course what I meant was the creditors of Titan Company A/S, not Dr. Jebesen's personal creditors.

The COURT. Very well.

Mr. LOCKE. I think this compilation of printed matter is more nearly in the order of the proof we will make, and we would like the Court to have that corrected copy.

The Court indicated last night at the close of yesterday that he might entertain motions. Before the Court en-

tertains any such motion I should like to offer two
580 letters in evidence which I think are necessary and

should be part of the record before the Court considers such motions. The first is a letter written by A. Thompson, Second Vice-President of Titanium Pigment Company, Inc., to Mr. Evans McCarty, Vice-President, dated January 20, 1926. I have explained to Mr. Whitney and to Mr. Webster that this is a letter that we had not yet given to Mr. Whitney to be printed because in our order of proof it occurred much later. However, I had given Mr. Whitney a copy—I did before court—and I anticipate Mr. Webster has a copy of that letter.

I should like to offer that in evidence, if the Court please. Before any discussion is had on it, I should like the Court's permission to read this letter because I think the details of the letter are of sufficient importance—

The COURT. It is not yet marked.

Mr. WHITNEY. I am going to object to it.

The COURT. I will give you an opportunity to do that. First just let me make a note of it. Who is this letter signed by?

Mr. LOCKE. A. Thompson, if the Court please, who is indicated here by the National Lead Company as having been a vice-president of Titanium Pigment Company, and who was also a director of Titanium Pigment Com-
581 pany from time to time. I have the schedule here before me.

The COURT. Before you tell me what it contains, you say there is an objection?

Mr. WEBSTER. We make no objection to this letter.

Mr. WHITNEY. I object to it on two grounds. This letter, in substance, is an expression of opinion as to patents, and it is dated January 1926. My first objection is on the ground of materiality; that an opinion as to patents nineteen years ago has such remote materiality that it is prejudicial to us to have it in the record. My second objection is on this ground of competence, that it is an opinion and that opinion evidence must be given on the

witness stand where one may cross-examine the expert. I am not contesting that Mr. Thompson wrote the letter, or that he was a second vice president, or even that he was a chemist, so that if he took the stand he could express an opinion and we could then cross examine him. As it happens, this letter is characteristic of the type of letter that creates prejudice. He expresses an opinion in 1926 as to what the patent situation will be in 1934. It is now nearly 1945 and I half believe that if we could cross examine him we would bring out that the opinion was proven by events to have been totally unfounded. But if the document goes in and is read it is prejudicial, and I submit in violation of the rules of evidence on both counts.

582 The COURT. Well, Mr. Whitney, I think your point is well taken; that probably this could not be received as opinion evidence of the validity or invalidity or whatever it is that he expresses opinion on, with respect to patents, but I think you will probably agree that the letter may be admissible as a declaration by this officer of what his state of mind was with respect to the patents, and since intention and state of mind is one of the elements in issue, it would seem to me that the letter would be admissible on that score. I have not read the letter but I am taking at full value your statement as to what it is likely to show.

Mr. LOCKE. May I say that is the only purpose of offering it.

Mr. WHITNEY. If confined to that ground, that meets the ground of my objection. Of course your Honor I take it I do not need to repeat here a continuing objection on the ground of connection; an intracompany communication, a National Lead letter between two officers in 1926, and I take it it is admitted as an admission on behalf of National Lead for whatever that is worth as of that time.

583 The COURT. Let me say, of course, this letter would not be received as evidence of the validity of the patents or of the invalidity of the patents, or their infringement or non-infringement. This not being a patent suit in which the Titanium Pigment Company is charged with violation, and even there I doubt whether admissions as to validity would have any significance; it might as to infringement, but I am taking it purely for what it purports to be, namely, as to what Mr. Thompson's mind contained at the time he wrote the letter, and

of course you would be free to introduce evidence and so would the Government have to introduce evidence if they desire, to show in fact the patents were invalid or of little value at that time. The objection is overruled. (Government's Exhibit 69 received in evidence.)

The COURT. Do you want to read that letter?

Mr. LOCKE. If the Court please, rather than summarize the whole letter I should like to read those parts of the letter which are pertinent and which will serve some purpose at this time.

Reading from page 1:

"My dear Mr. McCarty:

"In considering the policies to be adopted by this
584 company in the future I believe that some of the points referred to in the following paragraphs may prove of interest to you.

"All of the controlling United States patents of this Company with the exception of two will expire on or before September 18, 1934."

Then he goes on to say that others expire March 14, 1939. I will read the next paragraph:

"It is probable, therefore, that the Company's patent control will practically cease during the Fall of 1934, which means in approximately $9\frac{3}{4}$ years.

"The National Lead Company purchased control of the Titanium Pigment Company as of August 1, 1920, or approximately $5\frac{1}{2}$ years ago.

"Neither this Company nor the Titan Company has any patent which controls the manufacture of titanic oxide as such and as we know there are other companies now offering titanic oxide for sale.

"Until very recently we have never seen a titanic oxide pigment that had tinting strength of over 700 (compared to white lead as 100). During the latter part of 1925, however, we have made in our small chemical plant at Niagara Falls titanic oxide products of good color of which the tinting strength has been as high
585 as 1200, and in one case the tinting strength ran 1400.

"So far as I am aware there is nothing in our patents or those of the Titan Company which would prohibit another manufacturer from making a mechanical mixture of such a titanic oxide with an extender pigment. Such a mechanical mixture might conceivably have tinting strength nearly equal per unit of titanic oxide contained to our composite pigments."

Reading from the second page:

"This Company has three U. S. patents"—he gave the numbers—"all of which expire on November 21, 1933, which broadly cover paint containing amorphous titanic oxide and iron oxide, paint containing amorphous titanic oxide and white lead, and paint containing amorphous titanic oxide and zinc oxide.

"If the validity of these three patents can be sustained they would undoubtedly prevent the use of mechanical mixtures of titanic oxide and extenders or of titanic oxide itself in paint mixtures containing the titanium pigment alone or mixed with either white lead or zinc oxide.

"Assuming, therefore, that these three patents could be sustained this Company might be able to preclude the sale of titanic oxide or mechanical mixtures of
586 titanic oxide and extenders for use in paints until November 21, 1933, or approximately $8\frac{3}{4}$ years hence.

"It is apparent, therefore, in a general way, that this Company's patent control of the situation is a matter of less than ten years, or less than twice the period since the National Lead Company purchased control of this Company.

"I believe that all of us, who have watched the rapidly developing use of titanium pigments, are convinced that ultimately these pigments will be used in large tonnages.

"I believe also that there has been sufficient activity on the part of others in connection with the research and development of manufacturing processes to indicate that were it not for the strength of the patents of this Company and the Titan Company other titanium pigments would have been manufactured and marketed on a much larger scale before this and certainly will be as soon as the patent protection expires:

"In view of the above it seems to me self-evident that the policy of this Company should be to rapidly increase the production and use of titanium pigments during the next eight or ten years, to enlarge our research,
587 development and to obtain control of the most available sources of raw materials, so that the Company's position at the expiration of its patent protection would be as strong as we can make it."

I skip to the last paragraph and only paragraph on the last page:

"While I appreciate my lack of experience in this field

in which that of others in our organization has been so great I cannot escape from the conviction that failure to develop the market for Titanium pigments to the fullest extent, during the patent protection period, by maintaining high prices, and low production, is a policy which will be regretted at a not distant date."

And it is signed "A. Thompson."

Now, if the Court please, before I make any comment, or before any comment is made on this exhibit, I should like to offer the next exhibit because the two are so related that an intelligent discussion can be had only that way.

The COURT. All right.

Mr. LOCKE. This exhibit, if the Court please, will be found among the printed exhibits and it appears on what is marked page 73.

The COURT. The exhibit you have just read?

588 Mr. LOCKE. No, the one I am about to offer, and I should like again the Court's permission to read from this document.

Mr. WEBSTER. No objection by the National Lead Company.

Mr. WHITNEY. Your Honor, could I add this one word: when your Honor ruled on my objection you expressed yourself on the subject of competence, and I would like to say a word further on materiality, which you did not express; because it may save a great deal of time; at least it will clarify the positions.

The ground of my objection as to materiality goes entirely to the date and the fact that these are forecasts, prophecies and guesses. Now it will be quite apparent, your Honor, that if someone had predicted in January 1926 as to what type of political administration there would be in the United States say in the fall of 1934, that prediction today would be laughable. Or suppose that in January of 1926 someone had predicted what the political situation would be in Europe in the autumn of 1934. Now I submit, your Honor, that if antitrust cases are to be anything less than a farce, that we have to apply some of these common sense principles, some of those principles of human experience relating to the admission of evidence.

589 Your Honor will observe that the Government is taking this position—and I may say in passing this is the first case of this character that has been tried, and this is, I think not without importance—

and the Government is taking the position in this trial in the year 1944-45, it is sufficiently material, within the rules of materiality, for the Court to consider what, in January 1926, officers of the company forecast would be the patent situation in the autumn of 1934. If that be so, and if that be proper, if your Honor rules against me on this, then it becomes a subject of inquiry as to what were the guesses beginning in 1926 and thence forward and as to what actually happened. Obviously if this is in, I become entitled to call witnesses and put in all the evidence that we may have written in 1926 and probably before that, 1923 or 1924 about what we thought would be the position, and Mr. Webster the same, and then all the actual developments of each patent that is mentioned in this letter.

590 And that is if I am overruled as to immateriality and my submission to your Honor, because I have observed, if I may say so, the remarkable way your Honor has taken hold of the issues here in this case that this is a challenge to us to confine these cases within reasonable, workable limits so that both the trial court and the appellate court may have before it both records that are based upon some common sense degree of genuine worth and relevance and materiality, and I know that it has often been the practice before commissions like the Interstate Commerce Commission to hold hearings over a period of years, sometimes three or four or five years, in which the room is filled with members of the legal profession who just put in everything, and the witness sits there for weeks, and then the other side puts in everything the next year or the second year thereafter, but I do not think it right to degenerate a federal district court to the same level of proof-taking. It seems to me that when a case is taken out of the mere administrative proceeding, as this is done by act of Congress, and put into the field of equity, or chancery, so that it is for the Court to resolve, to perform the equity function, which is merely to issue a decree for the future, that then this right for the Government to try the cases upon the basis of

591 having peoples guesses 19 years ago about a situation to come 10 years ago I would respectfully submit to your Honor would be a great blow for decent justice if your Honor were to rule this out on the ground of materiality, and if your Honor is wrong the reversal will be only an aid to the law for us to find those things out. This would be a splendid subject to discuss in the

higher court; whether it was error to rule out material 19 years ago guessing about material 10 years ago. The thing that has distinguished Anglo-American jurisprudence has been the common sense practicability of the common law. The rules of evidence have been built up, as your Honor knows, by your Honor's predecessors over 700 years, and I profoundly regret to participate in the prostitution of those rules so that the conduct of an important lawsuit becomes nothing more nor less than the pouring in of every conceivable paper and then the other side pouring in every conceivable paper, then asking for this summer or next summer or six months after the right to write a thousand-page brief, and then by that time the whole thing is so dead that the public rightly criticises the bench and law for conducting themselves in that way.

That is what, I submit, to your Honor, is the ground of the objection of materiality to this paper.

The Court. Well, the general thesis that you subscribe to finds a very receptive hearing here, and I
592 was under the impression that I had given voice at the close of yesterday's session to an attitude towards the reception of evidence in antitrust cases which does not depart far from well established principles which you have just now indicated.

The problem is these rules of evidence, and I take it there are no special rules of evidence in anti-trust cases which are distinguished from the rules in an action for a tort or breach of contract of any other type of case, but the question is, what are the issues of fact and what are the relative types of probative material which can be received to resolve those issues.

Now I am speaking out loud instead of simply ruling on your objections, because I think we will perhaps clarify some of these problems and make progress.

You take Plaintiff's Exhibit 69, for instance, which has just been received, and with respect to your objection has been overruled. It is a communication from an officer of TP to an officer of a subsidiary of National Lead.— I think McCarty is an officer of United Lead—

Mr. WEBSTER. He was also an officer of National Lead.

The Court. Also an officer of National Lead, in which Thompson, apparently a scientific gentleman,
593 makes some forecast as to the patent situation in the future. Now if that is all there was to it and if the issue was, what is the patent situation in 1934 or

1939, the dates to which he projected his prophecy, I would not receive that letter and I would regard it, as to us, unlikely to be of significance so that I would not even suggest having it marked for identification to preserve it for the Circuit Court. Clearly whether or not, strictly speaking, its relevance could be established, its weight would be microscopic so as not to warrant the disturbance of this record with that kind of material. In a sense we would say it was not probative, it was not relevant, or, more accurately, it was not material.

But suppose the issue is not what the patent situation was in 1934. The issue is, as I see it, this: A, B and C enter into certain agreements. Those agreements, in one view of the situation, might be regarded as lawful business transactions relating to licenses under patents. Under a different view of the situation those agreements may be the instrumentalities and means by which a conspiracy in restraint of trade is being perpetrated. And frequently—I don't know whether it will be so in this case,—but frequently the line of division between one or the other is entirely determined by what the parties contemplated as the direction they were traveling.

594 Were they going in the direction of a restraint of trade? Was that their objective to which these agreements were the means? Or were they simply exploiting patent monopolies as they had a right to do under the law and making agreements relating thereto? Or were they selling licenses and entering into covenants ancillary thereto which in part may appear to restrain trade? Or were they engaging in some other legitimate objective?

Now if the issue is, and I take it that one of the issues here is, what was the objective and purpose of the defendants and the purposes denominated as co-conspirators, a word which I do not like and for which I think the bar ought to invent another word not as charged with culpability as the word "conspirator"—but I do not use it with any connotation other than to identify certain corporations,—the question is whether they had in mind a scheme to monopolize and restrain trade.

Therefore let us suppose that Mr. Thompson writes a letter in 1926 to his president, "Our patent situation is rapidly evaporating. Therefore if we are going to control this business it is very important that we enter into an arrangement with other persons who have some participation in this enterprise so that between us we
595 could monopolize the trade of the world in titanium." Suppose he said so, and then next year or

next month you see negotiations commencing between the president of the corporation, to whom that letter is written, with other persons controlling deposits of ore; with other persons controlling accommodations for factories; with other persons controlling outlets, and agreement which confirm and which are reciprocal in character, the inference would be, presumably—not absolutely, but presumably—that the agreements were being made in connection with the suggestion made and that the object was not to exploit patents but to monopolize and restrain trade.

596 Therefore, the letter becomes material because it affords a permissible inference, and any document which affords a permissible inference on an issue of the case is relevant and material. As to weight, that is a much more difficult question, but whether much weight or little weight can be assigned to it is a problem that depends upon a subsequent evaluation. Clearly, of course, remoteness in time would tend to moderate weight and a remoteness in causality might tend to mitigate the weight to be assigned but it has some weight, and it is on that line of reasoning that I have been admitting exhibits of the character of Plaintiff's Exhibit 69. Not at all as evidence of the validity of the patents in 1934. I do not even receive it as proof of the fact that the patents were going to expire in 1934; and if the patents do get introduced in evidence they would have an expiration date of course arithmetically calculable and that would of course dissipate any possible prejudice that arises from any statement of this kind.

A document like Plaintiff's Exhibit 69 is received solely as evidence of what was turning over in the minds of these gentlemen in order to throw light upon the intention and purpose of their activities following thereupon in the execution of the lettered exhibits which

597 are the matrix of the case.

Mr. WHITNEY. I follow that clearly, but upon that basis does it not follow, in the light of the colloquy we had last week and the citations of the Second Circuit Court of Appeals cases, which are supported in all circuits, incidentally, that this is not an exhibit that is to be taken against du Pont subject to connection, that the exhibit cannot be taken against du Pont at all because it is admitted as an admission or declaration of what is in the minds of officials of Titanium Pigment. And even if it were during the period when it was charged that du Pont were

within their conspiracy and it had been established that du Pont had entered into it—that is, the connection had been established—the mere declaration or admission of intention is not admissible against du Pont, the co-conspirator, and that is certainly true at a period before the time that du Pont is charged to have been drawn in or established to have been drawn in. Therefore, these papers prior to the period with du Pont, to use Mr. Dixon's phrase, come into it, but these papers that your Honor admits on the ground of their being admissions or declarations of evidence of purpose or intent of gentlemen of National Lead or Titan, Inc. are inadmissible against du Pont, apart from the question of connection, 598 wholly apart.

The COURT. Well, that problem has given me some concern. I would like to have you help me resolve that, since you bring it up now, and this is as good a time to discuss it. Again I am in the realm of hypothesis because I don't know yet what the case will show. Clearly, du Pont is not a party to the transactions at the time this exhibit was created, and I do not understand that the Government charges that du Pont would have been under the conspiracy in 1926. If I remember the pleading correctly, du Pont does not actually enter upon this scene until some time in 1933, maybe shortly before that time.

Mr. DIXON. 1932, your Honor.

The COURT. 1932. Culminating in the actual formal arrangement in 1933 and, I would suppose, following a period of negotiations which may have had an early history, maybe a year or possibly more. So, from that point of view you are right—this clearly cannot show du Pont's frame of mind in 1926, and even if it could show du Pont's frame of mind in 1926 it would not be material because it is not alleged that du Pont had any participation in it at that time. But I am struggling with another rule of evidence and I am going to give it an inartificial expression and 599 see if I can polish it down in the discussion.

Let us suppose that it is established by the Government that National Lead and TAC and subsequently SIT, then LG, and then the British and the Japanese, each in succession, did deliberately concoct a scheme for the purpose of monopolizing the world trade in titanium. Let us suppose that, and let us suppose that the Government has established it. Then they establish that du Pont joins the enterprise—I won't say the conspiracy. Well, (a) if du Pont joins the enterprise and the enterprise is a legitimate patent exploitation and not an illegitimate conspiratorial

monopoly, then du Pont's conduct is innocent, regardless of anything else, because then it has joined a legitimate business transaction. If it has joined a conspiracy in restraint of trade, let us suppose for a moment—this is an equity suit, not a criminal suit—let us suppose for a moment that National Lead and Titan are engaged in an unlawful conspiracy under the antitrust laws and that du Pont innocently unites itself to their efforts, that is, that du Pont's purpose is purely patent exploitation or business expansion without any intention to restrain trade; but that nevertheless it lends its aid in such a way so that a gap in the ring established by the conspirators is closed, although that is not du Pont's
600 intention but it is the intention of the other conspirators that du Pont's aid should be used in that way.

Do you follow me, Mr. Whitney?

MR. WHITNEY. Yes, your Honor, I do.

THE COURT. Would not that—I am asking the question now, having no opinion on the subject—would it not warrant a court of equity in disturbing the relationship between du Pont and the other members of the conspiracy?

MR. WHITNEY. Your Honor, that is an excellent question, if I may say so. I take it that the substance of the wrong is exactly the same in a criminal case as the equity case because it is a wrong under the statute and both remedies are provided. That is the first point. The second would be that the difference between the two proceedings is in their object. The criminal case is designed to punish for the past wrong, criminal wrong. The equity case is designed to be remedial of the present suffering of the public flowing from the past wrong.

Now to that extent the equity case, the court in the equity case governs itself by a consideration always of: How is this going to aid me to determine how I need to remedy this situation in the nation, looking to the future, to provide a better situation for the future?

601 And, as your Honor said, suppose that du Pont came in innocently to a group of others who we will suppose were engaged in a wrong. Then I entirely agree with you that even though entirely innocent it might be that du Pont could be affected by the decree, just as your Honor pointed out the other day—a contract might be struck down between a wrongdoer and a rightdoer and the rightdoer could not insist upon the contract that grew out of a wrong of which he was innocent.

However, that would not warrant findings of fact.

conclusions of law and the entry of a decree or judgment against du Pont as a defendant. Du Pont would not have been a conspirator under the antitrust laws.

The COURT. Let me see if I get you straight. You mean that the decree might provide that National Lead shall have no relations with du Pont?

Mr. WHITNEY. Right.

The COURT. But it might not provide that du Pont shall have no relations with National Lead?

Mr. WHITNEY. That is right. Because the decree can only in an antitrust case go against the defendant that has done wrong. The equity decree in an antitrust case can only be entered against the party that the judge, had he presided over the jury trial, would have thought the jury ought to or could have convicted, because
602. otherwise there is no violation of the antitrust laws against which a judgment or decree can be entered. Suppose the decree said generally National Lead is a great company and therefore it may not enter into any agreement of this type with any other major American company or, alternatively, the decree might say with any other American company. But that would no more merit the entry of a decree against du Pont than it would the entry of a decree against Zirconium. Equity would lack the power.

The COURT. If you don't mind, let me interrupt you at this point. I am willing to assume at this point that what you say is so. I am going to assume that in my succeeding argument. Now, clearly I think you would agree that if it had been established now already in this case that both National Lead and du Pont—when I say established I mean prima facie evidence had been offered—that both National Lead and du Pont were guilty participants in a conspiracy, would you not agree with me that although this letter antedates du Pont's adherence to the conspiracy it would nevertheless be admissible against it as well as everybody else?

Mr. WHITNEY. No indeed, your Honor. That is precisely what the Second Circuit Court of Appeals and all the other Circuit Court of Appeals have held.

603 The COURT. That is what I want to get at.

Mr. WHITNEY. That admitting that A and B are established to have become co-conspirators, the only declarations by B which are even then after admissible against A are the declarations that constitute a part of the operation of the conspiracy.

The COURT. It cannot relate to events prior to the adherence of the particular conspirator? That is what I want to get clear.

Mr. WHITNEY. No. The point is this, your Honor—

The COURT. A, B and C are conspirators from 1926 to 1930 we will assume. During that time A's declarations are admissible against B and C in furtherance of the conspiracy. That is true. In 1930 D formally adheres to the conspiracy, and from that point on he participates in and furthers the conspiracy. Clearly, declarations made by A with respect to post-1930 events in the furtherance of the conspiracy are admissible against D. That is true, is it not?

Mr. WHITNEY. No, your Honor, not if they are merely declarations.

The COURT. I say, declarations in furtherance of the conspiracy.

Mr. WHITNEY. That is the distinction.

604 The COURT. I am making that distinction. Declarations in furtherance of the conspiracy.

Mr. WHITNEY. Well, I agree.

The COURT. Now would you say under those circumstances that declarations by A in furtherance of the conspiracy, which at that time was a small partnership, become admissible against the larger partnership and the individual partners thereof when subsequently more partners are taken in? That is what I want to know.

Mr. WHITNEY. I am awfully sorry, I just missed a connection. If we take A, B and C as the other parties and D as the later—

The COURT. A, B and C are the conspirators from 1926 to 1930; in 1930 D is admitted as a member of the conspiracy. A has made a declaration in 1926 which is clearly admissible as against A, B and C. Let us assume that. Query: Does it become admissible as against D when he subsequently joins the conspiracy in 1930?

Mr. WHITNEY. I think the answer—that is this question—

The COURT. That is hitting the nail on the head.

Mr. WHITNEY. The answer to that depends upon whether the statement by A in 1926 was in furtherance of the conspiracy or was a mere declaration or statement otherwise than doing the work of the conspiracy.

605 Now the point is, if I may say so, your Honor, that the ground upon which you admitted this evidence this morning, as stated by your Honor very clearly,

was that you were admitting it as a declaration by one of the defendants expressive of his intent or state of mind and you did not admit it as part of the operation of the conspiracy itself.

Now if it were part of the operation of the conspiracy itself then, as read already by Mr. Locke, it would have relevance, even a certain materiality, only to the question whether in 1934 the parties then in the conspiracy—I will say then in the combination—were conspiring against the antitrust laws or were honorably interchanging licenses under patents, because the issue to which the material in that letter goes is the issue whether in 1934 there were genuine patents or there were not.

Now Mr. Dixon in his opening said that his theory was that he was going to show your Honor that there came a time, I think he said in 1936 or thereabouts, when the basic patents expired and that thereafter there was no patent basis for the agreement to which we were a party and that, therefore, it must be a restraint of trade intent. Now it is to that issue that this letter is directed; it is submitted to your Honor as evidence to support a proposed
606 finding of fact that in 1934 the basic patents expired.

Now the immateriality of it is that it is a mere guess as to that in 1926, but that is a different question. That is the reason I thought my materiality ground was sound. But then your Honor said: Yes, Mr. Whitney, in effect I would agree if that were so, but I am going to admit it on a different ground; I am going to admit it merely as a declaration of what was in the mind of Mr. Thompson and perhaps the addressee Mr. McCarty, therefore what was in the mind of National Lead Titanium Pigment, Inc., which is one of the co-conspirators, is expressive of their then purpose. And, therefore, I submit it falls within the class that this certainly cannot be admitted against du Pont no matter what is subsequently proven about du Pont.

The Court. I am thinking out loud. Let us for a moment dismiss the long time element from the consideration. I do it for this reason, that whether a particular time length is sufficient in and of itself to make a thing too remote to be material depends of course on the texture of the problem you are dealing with. The projected invasion of the low countries by Hitler would make events in 1923 material, whereas some other activities two days later might be re-

607 garded as too remote to be material. Now here, if the government is right, we are dealing with a projected scheme to embrace the earth within the control of a few people in the distribution of a specific commodity. Whether eight years is too long a period to project that kind of plan I certainly would not want to rule as a matter of law; I might have to respond to it as a matter of evidence in the evaluation of all the facts. But let us assume that instead of 1926 this is 1932, five days before du Pont makes it first move. The principle of law would then be more closely within the focus of our consideration, because if what you announce as the applicable rule is valid it ought to apply to that case as well as to this one.

Mr. WHITNEY. Oh, yes. The Circuit Court of Appeals applied it within the period of conspiracy. It said a mere declaration within the period was not admissible.

The COURT. All right. Now let us suppose that we get the following context: On Monday Mr. Thompson said to Mr. Cornish, purely a declaration of what is in his mind: These du Pont people are going to break up our monopoly because they have got tremendous scientific resources at their disposal, unlimited capital and I fear them, and since we can't break them we had better join them. Suppose

that occurs, purely hypothetical two days before du
608 Pont has even reflected on the problem of titanium.

The evidence shows that two days later an officer of du Pont is in conference with an officer of National Lead—now, you realize that I am now dramatizing without relating to any of the events proved—and that a month later an agreement is entered into between National Lead and du Pont which, as I have already indicated, might be construed as purely patent exploitation or might be construed as monopolistic in character, depending on what you find the intention of the parties to be.

Now I would like you to answer me specifically and I will hear argument on that because I think that gets into the heart of the question. It thus appearing that du Pont has joined the enterprise, are the conversations or the declarations of Mr. Cornish two days before du Pont was invited to join this group admissible as against du Pont on the question of whether the arrangement between National and du Pont is violating the law?

Mr. WHITNEY. Your Honor, I go further. I understand the law to be that Mr. Cornish's declarations after du Pont is connected to something, although admissible as evidence of the criminal intent of Mr. Cornish, are inadmis-

sible as evidence of the criminal intent of du Pont.
 609 Now suppose a small bank engaged in counterfeiting, passing out counterfeit bills, and a customer comes in regularly, the FBI, thinking that they are working together, arrests them, they are indicted. Assume their course of conduct began on the 1st of January. The Government calls the president of the bank who has become a Government witness and he testifies and identifies a letter that he wrote on the 2nd of January to the cashier saying, "It's wonderful that we have sucked defendant B into this scheme of ours because his passing out these dollars for us is really wonderful." And of course if we—

The COURT. It is inadmissible.

Mr. WHITNEY. Yes. Inadmissible against B.

The COURT. But supposing he says, "Let us suck B into it because he would be a wonderful outlet." That is a declaration in furtherance of the conspiracy.

Mr. WHITNEY. It is equally inadmissible because—

The COURT. Is it equally admissible?

Mr. WHITNEY. That is a declaration in furtherance of what at the moment it was made was only a plan or intention of the bank to which the outsider was not a party.

The COURT. That is true. My example, therefore, was bad for that reason.

610 Mr. WHITNEY. Well, it is like this case only this case isn't even that much. What your Honor has ruled is that here in advance of du Pont appearing on this scene at all a supposed conspirator has said—if Mr. Locke's view of the evidence is sustained—"I want to engage in a conspiracy." Now that is a mere statement that goes, as your Honor has ruled, to the issue of his intent, and as your Honor ruled, Mr. Dixon and his associates were vigorously nodding their heads and by that they were saying yes; and this whole case is going to the point that Mr. Locke said yesterday afternoon on the record it would go to, to the question whether there was an intent. And that is a point that must be proven in an antitrust case, whether criminal, equity or common law, because it is an ingredient of the substantive sections 1 and 2.

Now that evidence of intent goes only to the party that has stated it, it does not go against the other parties, assuming for the sake of argument either that they are subsequently to become or have already become co-conspirators. And I would submit therefore that if your

Honor were to admit this against du Pont you would have to have overruled me on the other ground and you would have to have said, I don't admit this as evidence of intent; I admit this as substantive material evidence
611 of the fact that in 1934 the major patents had expired. And, of course, I think your Honor ruled quite rightly that the prediction in 1926 is no evidence of that.

The COURT. I will hear a little more discussion on this.

Mr. DIXON. May it please the Court, this discussion I think will be very helpful because we are starting in now on the phase of the case where the Government will present numerous documents. We are not, however, in a court of law, this is a court of equity, so to that extent we are not bound by the rigid rules of evidence which are applicable in a case at law involving a jury, and that fundamental difference between the liberality in the application of rules of evidence in an equity case and those applicable to a criminal case have been recognized by the courts in numerous cases. So to that extent, I wish at the outset to take a different position from that taken by learned counsel for du Pont when he endeavors to urge upon this Court the same applications of the strict rules of evidence as would be applicable in a criminal suit involving an action for violation of the antitrust laws. Now we can give you ample authority for the
position we are taking if your Honor desires it.

612 I come now to the general theory of the conspiracy case. This is a case of course in which the defendants are charged with having engaged in a combination to restrain trade and commerce in this commodity and also to create a monopoly. Those are the two specific grounds or charges for violations of Sections 1 and 2 of the Sherman Antitrust Act. Now, if we were going to adopt in a court of equity a strict rule of evidence, it is obvious that in a conspiracy case, as your Honor has previously indicated, it would be practically impossible for the Government to ever even make a prima facie case. Recognizing the practical view of the law, and that is what we are here concerned with—this is not the same kind of situation as existed 500 years ago when you were dealing with hardly even a street corner business; today we are in a practical world where we are dealing with worldwide business, and no one knows that better than the defendants in this proceeding. In other words, the scope of the evidence that must be presented

for the consideration of the Court in this type of case is very wide by reason of the very nature of the case itself, and we have to start somewhere in order that we may get somewhere. And the general accepted views, as I

613 understand it, of the Courts in considering this type of case is to allow the evidence in against the defendants, as your Honor has done, subject to connection and subject to a motion to strike. Now, that enables the Court to get for whatever value the Court may care to attach to it such evidence as the Government feels relates in some manner connected with the proof in this case to support the allegations of the complaint, all of the evidence the Government feels that the Court should have in order that it can make an intelligent and fair decision.

Now, if it should develop that after that has been done and the evidence is in subject to a motion to strike your Honor may well decide at that time on a motion to strike made by the defendant of such evidence as has been previously admitted by your Honor subject to connection and subject to a motion, whether or not any connection has been established, you would at that time be in a position to apply the laws of evidence of which your Honor is fully familiar and of which we have endeavored in trial memorandum No. 2 to give you some general principles. In other words, let me put it this way: Who is damaged and who is injured or who will be damaged or injured by that method of the presentation of evidence in this type of case?

Now, I fail to see any prejudicial action or results, because in the last analysis if your Honor feels that the

614 Government has established a connection, then of course it does become material under the well established rules of conspiracy law. If however, your Honor feels that the evidence as we will give it to you in its entirety does not establish that du Pont was in a conspiracy or does not establish even the existence of a conspiracy, then of course the motion should be granted and the Government's case dismissed.

The COURT. Let me address a question to you. I understand perfectly well that as a practical matter I have to read this letter, whether I have to read it for National Lead's benefit or I have to read it for du Pont's benefit. I understand all that. Also I am fully aware of the fact that no great prejudice results from the reception in evidence in the sense of a jury receiving it.

because a court has to be trusted to pass upon the admissibility of the evidence, and therefore ought to be trusted to reject it if on analysis it finds it is not probative of an issue. I understand that I can trust myself in reading this letter, exhibit 69, to say that this shows, assuming that it does, that Thompson thought that the patents were about to expire and that something ought to be done about it; it does not show that du Pont thought that the patent situation required buttressing by monopolistic practice. I understand all that. But that is not
615 the question, and perhaps I am a little bit ahead of it.

The question comes down to a very specific one, where it is a close question, and that is why I put the question as I did to Mr. Whitney. Assume you show conspiracy on the part of National Lead and Titan and so forth, assume that you show that du Pont joined the enterprise, then the question comes up: Did du Pont join it for the purpose of monopolizing and restraining trade or did it not? Then the question is, can I read Plaintiff's Exhibit 69 and on the basis of that draw an inference: Yes, du Pont did have intentions to monopolize?

In other words, can I make a finding on this hypothesis which I have given that du Pont intended to monopolize trade—let us assume for a moment that Plaintiff's Exhibit 69 shows such an intention on the part of the other conspirator—and footnote that finding as to du Pont by reference to Plaintiff's Exhibit 69? Now, that gets pretty close and that is where you have got to put your finger on admissibility. Is it probative, is it relevant and admissible as against du Pont? And I wanted to also get an answer to the more general question whether declarations of this character antedating the admission of a conspirator to a conspiracy are admissible as against that conspirator when he subsequently joins the conspiracy. I didn't know the answer to that question.
616 You indicated that you thought the decisions you refer to pass upon that, and I would like to re-read them to see whether or not—

Mr. WHITNEY. That happened during the conspiracy. The citations were United States v. Goodman, 129 Fed. (2d) 1009, at 1013; and Van Ripper v. United States, 13 Fed. (2d), 961, at 967.

The COURT. Of course I don't want to find myself on a spur of this track considering the character of the declaration itself. In other words, that the declaration, re-

ardless of time, would be inadmissible because not a declaration in furtherance of the conspiracy. I am assuming that it is a declaration in furtherance of the small conspiracy, and, therefore, admissible as against the original conspirators. Does it become admissible against the new partners when and as they are admitted to partnership? That is a slightly different question.

Mr. WHITNEY. That is how the whole discussion arose. If you say that it is a declaration in furtherance of the conspiracy you then, in my understanding, reverse yourself upon your earlier ruling that you would not accept it on the issue as to whether or not in 1934 or at any time there was a conspiracy.

The COURT. I don't say it that way.

Mr. WHITNEY. I thought you were accepting it
617 as a declaration only—

The COURT. No. That is true. But suppose you have a conspiracy in which a conversation is reported that A, B and C are in session, and the evidence showed or there is a declaration that A said, "There is a bank to be looted at Fifth Avenue and 42nd, let's go and loot it." This being a conspiracy of bank looters. That would not be admissible to prove that there is a bank at Fifth Avenue and 42nd Street, but would be admissible as a declaration in furtherance of the conspiracy to go to loot a bank at Fifth Avenue and 42nd Street.

In the same way here; this does not prove the fact that in 1934 there were not perfectly new and valid patents or old patents, but in any event newly-discovered inventions patented which made the patent monopoly of the defendants invulnerable. It can only prove from the nature of the declaration that Thompson thought in 1936 that in 1934 the patent situation would be vulnerable. But even that declaration is a declaration in furtherance of the conspiracy in the sense that he said those words with the object of advancing the interest of the conspirators toward the task that they were setting themselves to do. And unless I am completely in error about that, my conception of a declaration in furtherance of a conspiracy means just that. It does not necessarily exclude
618 all substantive evidence.

Mr. WHITNEY. Your Honor is aware that this does not say a word about what they ought to do after the patents have expired.

The COURT. I understand that.

Mr. WHITNEY. It says, Let us make the most money

we can while the patents are going, because after that is over we won't be able to do anything, which is a declaration of innocence, you see.

The COURT. That is quite true.

Mr. WHITNEY. It couldn't be thereafter in furtherance of the alleged conspiracy. It negatives it. The alleged conspiracy is that after the patent had gone the party set out to restrain trade, using as your Honor said patent instrumentalities. Now, this paper negatives that, because this paper said, We have got to work under the patents because that is all we can work under, so let us work fast. In that sense it is not in furtherance of the alleged conspiracy. There I do have Supreme Court cases, indeed one within the last two years, the Glasser case, 315 U. S. 60, at 74 and 75, making the distinction between the allegations of aiding the conspiracy and the allegation that is right against it. I will submit the citations later, three or four more, that are perhaps more illustrative of that.

619 Now, you see it is very interesting. When Mr.

Dixon came to reply I tried to follow him very closely and I thought the whole was in one text and came down to a statement toward the end that he made. He said, We have now come to the stage of introducing documentary evidence; your Honor is sitting in equity and not at common law with a jury; therefore, it is your Honor's duty to sit absolutely silent, in effect, and receive everything that the Government thinks it ought to put in. That is a misconception of the relationship of the Court to the Department of Justice.

The COURT. I don't understand that the rules are any different for one or the other. I think the application as a sensible proposition is frequently different.

Mr. WHITNEY. Right.

The COURT. And I think you and I will both agree there are many things we do in an equity case that we would not follow with a jury. But that is not because the rule is any different, it is because the jury is different.

Mr. WHITNEY. Mr. Dixon's practical suggestion was that the way he reconciled the two thoughts your Honor has expressed, the rule of convenience in equity and the rules of evidence was that your Honor should admit everything without question that the Government is

620 introducing, because, he said in so many words, your Honor ought to receive all that the Government thinks it wants to put in in the way of documentary evidence, and then at the end of it he said your Honor

may entertain motions to strike. Of course, that suggestion as to procedure would mean that we would have these appalling briefs at the end of this case and your Honor would sit—

The COURT. Yes. Another reason why that can't function: if these letters were being received and we had a witness on the stand du Pont should be entitled to know now whether it should cross-examine with reference to these documents or not.

Mr. WHITNEY. That is right.

The COURT. If this evidence is not received against it it may remain mute. If it is received against it, why, it has to cross-examine or forever forego that right. And although we haven't the living witness on the stand, du Pont should know now as this evidence is received whether it is expected to offer evidence in rebuttal in contradiction of it or whether it should not. If it is not received against it it may remain mute. If it is received against it it has to marshal its facts and evidence in order to meet the issue as it is addressed to du Pont. So I do not
620a think we can quite do it the way Mr. Dixon suggested. But I confess that I am not entirely clear about the answer to one or two of the questions. I will have to examine the situation in the next day or so and perhaps deal with it more completely.

I think it is time to take a short recess.

(Short recess.)

621 Mr. WHITNEY. I would like to hand to your Honor a short memorandum containing the cases that I have cited just before the recess. I find I have not the case in which they said that the statement instead of being for the conspiracy was directly against it, but I will give you that citation, if I may, a little later on the record.

The COURT. Did you want to add any further remarks?

Mr. DIXON. I just wanted to ask your Honor's attention again to the fact that we have endeavored to cover, with such authorities as we could acquire to be helpful to the Court, under paragraph 4 of the trial memorandum, in number II, cases relating as closely as possible to the point that your Honor raised.

The COURT. I noticed that language that you had, "The acts and declarations of other conspirators before he entered are admissible against him," and of course your first citation threw me off, because 321 U. S. does not affirm 34 Fed. Supp. 267. I think that is error.

Mr. DIXON. We will check that, your Honor. It was affirmed.

The COURT. I confess that the first paragraph was the one I read, because I anticipated that this is 622 the question that was going to arise and I wanted to get some light on it. Do any of those cases clearly hold to this proposition—see if I can put it to you in nailed down form—that a declaration made in furtherance of the conspiracy, sufficiently so that it is admissible against conspirators A, B and C, which declaration is made at a time, or which letter was written at a time, before D was a member of the conspiracy, is admissible against D when he later joins the conspiracy?

Mr. DIXON. Yes, your Honor. I believe we can refer you specifically to the Buckner case in our circuit, and the language there that is referred to as the fourth case cited. I just want to read you briefly the language or a portion of it that I believe may help in answering your Honor's question:

"And when once a connection was shown between Conomino and the conspiracy, evidence of the earlier activity of Buckner and Gillespie"—those were the other defendants and co-conspirators—"during the spring and summer of 1937 tending to prove the origin and existence of the conspiracy was admissible against both Biacominos."

The COURT. Clearly. I do not find any problem there at all. In other words, I have no doubt that the 623 agreement of 1920, or the agreements of 1920, are admissible against du Pont, and I received them against du Pont because they joined the 1933 agreement. Do you get my point?

Mr. DIXON. Yes, your Honor. I have not any trouble about that score.

The COURT. You looked shocked, Mr. Whitney.

Mr. WHITNEY. I am sure you did that subject to connection. Du Pont made a 1933 agreement—

The COURT. Oh, of course, subject to connection. In this discussion I am assuming that it will be shown that du Pont joined the conspiracy. Otherwise we have not any problem. So I am assuming that du Pont joined the conspiracy, we will say, in 1932 or 1933. And I have no trouble on that score whatever. Of course you may then show, as against all the conspirators, the whole conspiracy from its origin. But the particular question that we were discussing this morning is on a slightly more refined prob-

lem. I think I will have to examine into it and may read these cases and see if I can get some more light on it.

Mr. WHITNEY. Your Honor, I am not going to mention the law, but just refer to the exhibit. Has your Honor the Exhibit 69?

The COURT. I haven't it before me.

624 Mr. WHITNEY. I will read two paragraphs that

Mr. Locke read, a very large part of it, down to about the middle of the second page of the letter, and then following those two paragraphs which are critical to the colloquy we have been having, and to the objection that was submitted to your Honor:

"It is apparent, therefore, in a general way, that this Company's patent control of the situation is a matter of less than ten years, or less than twice the period since the National Lead Company purchased control of this Company.

"I believe that all of us, who have watched the rapidly developing use of Titanium pigments, are convinced that ultimately these pigments will be used in large tonnages.

"I believe also that there has been sufficient activity on the part of others in connection with the research and development of manufacturing processes to indicate that were it not for the strength of the patents of this Company and the Titan Company other Titanium pigments would have been manufactured and marketed on a much larger scale before this and certainly will be as soon as the patent protection expires.

625 "In view of the above it seems to me self-evident that the policy of this Company should be to rapidly increase the production and use of Titanium pigments during the next eight or ten years, to enlarge our research development and to obtain control of the most available source of raw materials, so that the Company's position at the expiration of its patent protection would be as strong as we can make it.

"I do not feel that any of us can be entirely satisfied with what has been accomplished during the past eight or ten years, during which we have been working on the development of Titanium pigments."

The argument I am making is, that was a letter in furtherance with an object of Mr. Thompson, that he wished to make the object of his corporation; that they should, while protected by patents for the next eight or ten years at the maximum, both earn profits and gain a stronger position for National titanium pigments so that

when they would have to face open competition under the Sherman Act without patent protection under the Patent Law they would be in a position to do so. So I say that letter is a letter against the alleged conspiracy and not in furtherance of it. And I conceive that if that letter is in furtherance of it in 1926, if we do later get drawn into it, may be received in evidence against us, that is not my point. My point is that this letter is not in furtherance of the alleged conspiracy. I think you will find that the words "furtherance of the conspiracy" do not necessarily mean in furtherance of law-breaking.

That is the issue between us then and I will try to get this other case that is closely on the point.

The COURT. I think that the language commonly used by the courts is not "in furtherance of the conspiracy" or when they do use it it is an abbreviation of the phrase "in furtherance of the object of the conspiracy," and of course the object of the conspiracy here was to make money, I assume.

Mr. WHITNEY. Your Honor, God help the progress of our country if the Government is going to ask the Judges of the District Court to sit while they introduce all the documents that they may happen to have found in our files with the object of making money.

The COURT. No. What I am driving at is not, of course, quite as fantastic an idea as that. I mean this: a letter constituting a declaration in furtherance of a conspiracy need not in and of itself, constitute a declaration of scheme and plan of how to violate the law. In other words, the

627 declaration is admissible if it furthers the objects of the conspiracy in its broadest sense. In other words,

I can well see where Mr. Webster might introduce that letter to show that their intention was to engage in research and study and perfect their inventions in order to have a dominant position in the field and completely under the umbrella of the antitrust act and be protected from other monopolies, and so on.

On the other hand I can see where the Government wants to introduce that letter to show that the management of the company was apprehensive of the then existing patent situation, and then when subsequent events happened agreements are made and the Government wants to argue that that was done as the solution to the problem Mr. Thompson advanced rather than the solution that he suggested. Of

course that is argument on the evidence. But that does not determine admissibility.

Mr. WHITNEY. Your Honor, that is a most helpful point, if I may say so, and far more important in the way of looking at it. I take it that there is no distinction between what your Honor might have spoken of as the narrower and broader conspiracies. The point as I get it is this law—the reason it is so difficult is because it is so fundamental—has the characteristics, as Mr. Justice Hughes said, of a constitutional provision. This law simply says, and to enlighten Mr. Dixon he need not fear to go back five
628 hundred years; it goes back over three hundred years as Senator Hoar said on the floor of the Senate—this law says simply two things; you shall not unreasonably restrain interstate commerce. Now that is the whole law, provided that it is an agreement and combination or conspiracy between two or more, and it has been held it can be two men or two officers or two companies, so the Government can always prove that.

The COURT. No one yet has invented a way of doing business with one's self.

Mr. WHITNEY. Yes. And therefore what they set out to prove is that certain methods of doing interstate or foreign commerce, or certain acts in it, are unreasonable restraints of it. Now of course your Honor has to have the commerce before you pass upon it, and then you have to pass upon it. You see how utterly hopeless would be the position of any defendant in such a case if there were the jury that your Honor was surmising, if the rule were that anything that either party or any party wrote or spoke about with a view to reasonably encouraging any interstate commerce could be admitted as being in furtherance of the conspiracy. What the courts have said in the effort to give some protection to defendants in conspiracy cases is the only evidence that is admissible against
629 D coming from conspirators A, B, or C, is the evidence of A, B or C acting in furtherance of the objects of the conspiracy.

The COURT. You have transported my thought into another field.

Mr. WHITNEY. My thought is, I do not believe your Honor will conclude, after having a second look, as it were, that that means in furtherance of the legitimate objects—of legal objects. Because, as your Honor rightly analyzed your own remark, the ultimate object, the only valid object under the corporation law of the country, of the National

Lead Company is to make money, and that is the end of the rule. It just means about anything comes in in relation to titanium against us.

The COURT. No. I was not then thinking of it being brought into the field of additional conspirators. I was thinking of admissibility as against National Lead.

Now as against the additional conspirators, apart from the question of equity convenience, and not taking the time to do it during the trial, the rule of evidence is that the court looks at the document and says "Is this as a document in furtherance of the conspiracy that the Government is alleging, a conspiracy unreasonably to restrain interstate and foreign commerce, and if it is then it can come in against the other party."

630 Mr. WHITNEY. Then, as your Honor suggests, that means it is the kind of document that is most material evidence. It is a document of guilt. Of course either the Court in equity or a jury may conclude there are so many documents the other way that notwithstanding there is that document of guilt, it is outweighed by other documents of innocence. Or the Court may conclude, or the jury may conclude, that although there was guilt at some time, and that is our assumption, arguendo, position on the whole case of your Honor should find there has been guilt in the middle of 1930—

The COURT. There has been expiation?

Mr. WHITNEY. It ended long ago. And then that sequence follows. But the result is that this rule of admissibility against co-conspirator D of documents in furtherance of the conspiracy of A, B or C, is really I respectfully submit to your Honor, confined to documents in furtherance of the unlawful object. And I am glad to have that issue brought clearly out.

The COURT. I think I see your point, and I do not think I find myself far away from you. But let me ask one question of Mr. Locke or Mr. Dixon which might perhaps reveal something. Take Exhibit 69. I suppose one question we ought to ask of any exhibit is, what does it pur-
631 port to prove against du Pont? We are discussing du Pont now, there being no objection against National Lead or if there has been I overruled it long ago.

Mr. WEBSTER. There has been none, and when Mr. Locke gets through, I would like to say something about the letter.

The COURT. I will be glad to hear you. What does it prove against du Pont?

Mr. LOCKE. As of the present time nothing, because du Pont has not been established as a part of the conspiracy.

The COURT. All right. Next week what will it prove against du Pont?

Mr. LOCKE. It will prove this, that as early as 1926 there was a planned, definite—

The COURT. By A, B and C?

Mr. LOCKE. By A, B and C—plan to restrain trade, if the Court please.

The COURT. All right. Let us suppose that. What does that prove against du Pont?

Mr. LOCKE. When du Pont joins the conspiracy they accept the benefits of all acts that have been part of the development of the conspiracy prior to that time and become liable for all obligations that arise under it.

The COURT. On that point I have no trouble 632, whatever. But would you say this letter can establish the adherence of du Pont to the conspiracy?

Mr. LOCKE. No, but it establishes the acceptance by du Pont of the terms, conditions and developments of the conspiracy that had transpired up to the time they became parties.

The COURT. In other words, you offered this as you would the 1920 contract?

Mr. LOCKE. It has been a development of the 1920 contract, if the Court please.

The COURT. What I mean by that is, you want to offer this against du Pont, not in the sense that it establishes du Pont's participation.

Mr. LOCKE. That is right.

The COURT. Or adherence to the conspiracy or that it had support in 1926, but you want to establish the conspiracy between A, B and C and all you mean as against du Pont is that when, as and if it is independently established that du Pont joined the conspiracy of course then it becomes a full-fledged partner and from that time forward at least, it not retrospectively, it is charged with everything that has happened?

Mr. LOCKE. That is our position, your Honor.

633 The COURT. Well, maybe we are not so far afield. Maybe we are not in such complete disagreement. Maybe the people at the table behind you do not disagree with you on that score.

Mr. WHITNEY. Oh, yes, we do.

The COURT. I think that Mr. Whitney will agree with you—I may be getting into trouble trying to speak for

him—but I think he will agree with you that if it is established that National and Titan Company and IG conspired to monopolize trade, and then it is independently established that some time thereafter du Pont came along and said "We are joining forces with you; we are going to hold down one section of this front," that then of course du Pont is equally guilty of conspiracy to restrain trade and it is a co-conspirator and is subject to the penalties and what nots of the antitrust law. I don't think you will differ with that proposition.

Mr. WHITNEY. I agree to that. The whole point is, I say this letter is just the opposite. This letter was "the position of our company will be as strong as we can make it."

The COURT. Let us suppose that letter says "We think we ought to take du Pont into it." Do you get my point?

Mr. WHITNEY. Yes, I agree.

The COURT. Of course this letter does not prove anything against du Pont in a certain sense, but I think if you will agree, will you not, Mr. Whitney, that assuming the situation I postulated, that of course du Pont would then be a conspirator. And if the other conspirators had by that time, we will say, embraced certain countries, and then du Pont came in and filled in the open area, that of course du Pont could properly be charged with being a member of a conspiracy, world-wide in scope. I think that is clear. We are almost getting down to this point, that we might say as to this letter as against du Pont, it does not make any difference whether we receive it or not.

Mr. DIXON. That is right.

Mr. WHITNEY. It brings out a question in a very definite way. If your Honor were in a criminal court and had a jury—

The COURT. I think if I were in a criminal court and had a jury, I would exclude the document. In other words, I would feel I did not want the jury to get any impression that du Pont was in the picture at this time or this in any way indicated du Pont's frame of mind or du Pont's intentions, or anything as to what du Pont was doing in 1926, and of course this letter can only give it evidence as of 1926.

635 Mr. LOCKE. I want to correct a statement I made. I said we had not established that du Pont was a member of the conspiracy. What I meant was we

have not introduced all the proof which the Government proposes to introduce.

The COURT. I understand it. You feel, of course, you have introduced the agreement of 1933 and that you have established a prima facie connection with the enterprise regardless of whether you feel you have established a prima facie connection with the conspiracy illegally conceived.

Mr. LOCKE. That is right.

Mr. WHITNEY. Your Honor, that is the first time the Government said that, and I submit there is no such thing as distinction between the enterprise and conspiracy.

The COURT. He means he has done business with you.

Mr. WHITNEY. Well, your Honor, I mean your Honor jostles with your arms in the subway with a murder frequently. I do business with thieves, robbers, rogues of every description every day in my life, and I never know it, and I am frequently constrained to do business with criminals even if I do know it. Suppose I know when I

636 go to the subway window that the man in there is guilty of unlawful conduct and I put my quarter in and get five nickels? I am so glad Mr. Locke has

come forward, and it is the first time the Government has come forward, except in the concluding paragraph of Mr.

Dixon's memorandum, and said that the agreement itself brings du Pont into this. Because the very point is that

the bigger the conspiracy the more justification for the individual party that has individual transactions with

members. The alleged conspiracy is that they got together in this worldwide power. Now we could not compete in the United States with this worldwide power

without making a patent agreement with them, and the result is that they—your Honor has put your finger on the

whole heart and soul of this case when it comes to du Pont; it is as if the conspiracy were a great circle and it

is true we have a contact; we cut into the circle at a point, but the point is that we cut across it. We do not join it,

and that is the point; that what my friends say here is just the same as their associates have said before in other

places—have convinced me that they have not understood yet, and I think your Honor is going to understand, and I

think that the higher court is going to understand it after your Honor does, and then the public is going to under-

stand it, and that there is all the difference in the

637 world upon the facts between making a contract at arm's length with a conspirator or joining his con-

spiracy.

The COURT. That is right.

Mr. WHITNEY. And the only way we will establish that is through this trial and through it being found—and I am glad that Mr. Locke sticks to his view that he has already got us, as it were, because my submission is, he has not possibly, and I think there will be some bits of atmospheric whisps and straws that are going to give us the necessity of explaining and arguing a bit here and there through this case; in other words, you do not deal with people that are engaged in a worldwide scheme especially as insiders and many of these people have said things about you that you have to defend and explain, and that is where we are going to get to, and that is our problem, and that is the reason it has been worth while to pause so long over Exhibit 69 as a characteristic problem, and that is an extreme case of what the other people are saying among themselves. Later on we will have others.

Mr. WEBSTER. Your Honor, I have listened to this discussion with great interest and respect, and I now, if I may, would like to say something about the letter itself.

The COURT. Exhibit 69?

638 Mr. WEBSTER. Exhibit 69.

The COURT. All right, I will let you do that. He wanted to comment on 69 and 70 bracketed.

Mr. WEBSTER. I would rather comment on 69, because that is the letter on which the discussion occurred. I say we must bear in mind what the situation was and who the people were we are talking about before we begin to attach weight or not and attach weight to this particular document.

In the first place this was 1926. Business, while not perhaps in the creeping stage was in the crawling around stage. It was in its infancy. And this man Thompson, who has been referred to by Mr. Locke as a scientist or research man, we contend that he was not that at all; he was a business man connected with the old Titanium Alloy Manufacturing Company associated with Mr. Meredith who had the original patents at Niagara Falls, and who formed the Titanium Pigment Company. He was one of Mr. Meredith's men.

Now by 1926 the Lead Company, on the basis of the contract that had been made in 1920, had made a further investment in the Titanium Pigment Company, but was not at that time, and for some time after that, the owner of the Titanium Pigment Company, so that this was a case

639 of a man connected with the Titanium Pigment Company putting pressure on Mr. McCarty, who is addressed here as a vice-president of the Titanium Pigment Company—I think for the purpose of making him feel that he is a member of the Titanium Pigment Company family whether that is so or not, but he was, not really, he was the executive vice-president of the National Lead Company. He is trying to warm him up over what they have been doing at Niagara Falls and about which he thinks they are very cold down at 111 Broadway.

Another thing about Mr. Thompson that has to be borne in mind is that Mr. Thompson was a mining man, and when he talks about getting hold of raw materials he is talking about his own interest in the McIntyre project up in the Adirondacks which drifted around for years trying to find a father and mother but had to wait until this war came and made it the essential and vital source of supply of ilmenite. So if Mr. Locke has in mind these references to raw materials as having some connection with that Brazilian supply we were talking about yesterday, or that Mr. Lobstein was talking about in his letter to Mr. McCarty or about the Travancore deposits referred to in the case of these shares of Hopkins and whatever their name was, that is an entirely different subject. Here is a man writing from Niagara Falls in 1926 about something utterly different.

640 Another thing about the letter is that Mr. Thompson is referring primarily to the patents which he knew about, namely the Barton-Rossi patents at Niagara Falls. And it is true that certain of those patents would expire and did expire about 1934 or 1935 or 1936. But there was an enormous amount of work going on in connection with the Jebson patents, and even with reference to the Barton patents, which made that whole group of patents so desirable that our friends in the du Pont Company were glad in 1933 to come to us and say, "We want to have the use of your patents." Now they did not want patents for one year that were expiring in 1934. Presumably they thought, and the record will show conclusively, that they decided that we had patent rights in 1933 looking to the future, as well as know-how, which we could contribute to them. They said: "We think we want to join" what your Honor has rather aptly described as "the enterprise." I don't think it can be said for a moment that Mr. Thompson was writing, and this record will refute any implication that can be drawn from what he

said, that these people were all washed up so far as patents were concerned in 1934 and 1936.

Now there are some rather interesting things in this letter that have not been called to your Honor's attention, apart from the ones that F had intended to mention, but which Mr. Whitney mentioned, about improving the position of our company, meaning the Titanium Pigment Company, which Mr. Thompson was hoping Mr. McCarty would take a somewhat greater interest in than he had at that time.

Over here on the fourth page of the original exhibit, as distinguished from the printed exhibit, there is some very interesting discussion which Mr. Thompson is bringing to the attention of Mr. McCarty for the first time: things Mr. McCarty apparently did not fully apprehend about the value of his investment. He says:

"Of course there are a great many factors which determine the value of a pigment for use in paints, enamels and so forth, but assuming that a certain pigment has proven available for either exterior or interior exposure the degree of opacity would have a considerable or possibly controlling bearing on the value of a pigment to the trade. The best measure for testing comparative opacity except actually spreading tests is the tinting strength method, i.e., mixing the required amount of black with a definite amount of the pigment being tested and comparison with standard."

Then he goes on and gives a comparative table of the tinting strength of Titanox, C-pigment, titanite oxide as compared with white lead, zinc oxide and lithopone and instructing Mr. McCarty for the first time, and then he goes on to say:

"To sell same unit value as lithopone, on this basis, Titanox would have to sell at $3.5 \times 2.083 = 7.2905\text{¢}$ per lb., whereas C-pigment at 8¢ per pound is cheaper than lithopone at 5¢ per lb.

"One other point in connection with the development in the use of Titanox in paint formulae that does not seem to have been given sufficient consideration is the fact that combinations of white lead and Titanox, either with or without small percentages of zinc oxide, have proved exceptionally durable."

He is trying to relate this business to Mr. McCarty's white lead business so that Mr. McCarty will begin to pay attention to him.

And then he refers to some report Mr. Barton had made

and that Mr. Edgerly had made about these combinations, and winds up with this paragraph which I do ask your Honor to let me read again:

643 "While I appreciate my lack of experience in this field in which that of others in our organization has been so great"—in other words deferring to Mr. McCarty—"I cannot escape from the conviction that failure to develop the market for titanium pigments to the fullest extent, during the patent protection period, by maintaining high prices and low production, is a policy which will be regretted at a not distant date."

Now he is, not saying that that is his policy. He is not saying that is the policy which will be regretted, but, I should like to state to your Honor now, that this record will show fully that this is precisely the policy that was adopted. I am not talking about the patents, but the policy was to sell as much Titanox as possible at reasonably low prices.

The COURT. All right.

Mr. LOCKE. May I proceed now, if the Court please? I have offered the next succeeding exhibit, Exhibit 70.

The COURT. The same objection to that?

Mr. WHITNEY. I take it I do not need to repeat mine, your Honor.

The COURT. No. I will receive it in evidence.

(Marked Plaintiff's Exhibit 70.)

Mr. LOCKE. With the Court's permission I am going to read part of this. I am starting reading from
644 the first page of this exhibit written by Mr. Cornish, the president of National Lead, to Mr. McCarty, the vice-president, and, as Mr. Webster says, the executive vice-president:

"Dear Mr. McCarty:

"To correct any erroneous impressions I have and to suggest matters for further discussion, kindly permit the following:

"1. The Titanium patents expire in 1936 unless extended in ways not at present known to us.

"2. Dr. Jebesen's proposal would leave us free to adopt and pursue whatever policy we may desire.

"3. Probably the patent rights would fail unless manufacturing is done in Germany, England and possibly other countries.

"4. Arrangements can be made for the manufacture of Titanium pigments by one of two companies now existing

in Germany; one of which being the chemical corporation (probably the most important in the world), and that, if the Court please, is obviously IG—one of whose products now being manufactured is lithopone. The other is a smaller corporation near Berlin.”

645 That I think the Court will discover refers to Sachtleben.

“5. Arrangements with either of these companies would contemplate payment of royalties.

“6. Nothing definite is at present in contemplation to manufacture or market, either in England or other parts of Continental Europe; although efforts have been made to sell and familiarize the public with Titanium pigments.

“7. The Norwegian company has been losing money.

“8. It probably will continue to lose money until it reaches a point where it breaks even, and thereafter increasing sales will result in rapidly increasing profits.

“9. On a conservative analysis of the business and prospects, you estimate that, should we buy these properties, there would be no profits above cost of promotion for the first two years. That for the first five years we could reasonably expect a return of 6% on our investment. That for the following four years we could reasonably expect 20% to 25% on our investment; so that we would get our money back by the time the patent rights expired, and would have as our profit whatever prestige or good-will or other properties the Norwegian
646 company might possess at that time.

“10. You called attention to the fact that, if the Norwegian company or its successor enters into license arrangements for the payment of royalty during the life of the patents, at the expiration thereof the company manufacturing the goods would have the plant, the experience and the working force, and could easily recover the trade of all the concerns that had theretofore been selling the goods to the consuming public.

“11. In the foregoing I have correctly reproduced your statements, it seems to me that there could be but one answer to Dr. Jebson's proposition. I would be sorry, however, to dismiss it in this way. I believe in the future of Titanium pigments, but their development will be slow. The inertia of ignorance and prejudice cannot be overcome except over a term of years. European brands of white lead were imported into the United States for fifty years after prohibitive duty had been placed upon them. Ti-

tanium pigments will probably not find their ultimate place in this world for two or three generations. With all our advantages—by means of which we have caused
647 between three and four hundred different concerns to experiment with Titanox—we still find a fear and misgiving that has apparently stopped further increase in sales until the test of time and reaction of consumers justify a further aggressive sales policy.

"Therefore, with us in the United States and with the Norwegian company, there is a common need to exploit Titanium pigments and, at the same time, protect ourselves; so that after the expiration of patent rights, we may have the manufacture and sale thereof under our control so as to continue to reap the harvest from the seed we are now sowing. If you, therefore, could formulate a plan satisfactory to Dr. Jebsen, whereby we could arrange to pay a royalty to the Norwegian company similar to that he proposed to ask from the German company, under an agreement that the National Lead Company would endeavor to organize companies in Germany, England and such other European countries as it desired—in each of which companies the National Lead Company should acquire and own at least one-half of the capital stock outstanding—I would personally look with favor upon such an arrangement.

"I would be willing to buy the physical assets, including the mine of the Norwegian company; so that the only thing remaining in that company would be
648 its right to draw royalties until the termination of its patent rights.

"In the formation of companies in Germany, England and elsewhere, I would be glad to have the present stockholders in the Norwegian company join us to the extent they desire, subject to the limitation that the National Lead Company should own one-half the stock in such companies, and that there should be a local ownership by residents of the country where such plants are located who would have the active management of the company.

"I would also desire that arrangements should be made with Dr. Jebsen to retain his interest and continue as manager of whatever business the National Lead Company should acquire. This last is particularly urgent, as we have no one in mind to promote the work that we consider Dr. Jebsen, both by education and character, is especially fitted to do."

Mr. WEBSTER. Are you offering the notes on the bottom of that?

Mr. LOCKE. Again we do not mean that any of the notes shall be part of the exhibit.

The COURT. Strike it out. Is there any other comment?

Mr. WEBSTER. No comment.

649 The Court: You may proceed.

Mr. WEBSTER. I assume it would be appropriate now, Mr. Locke having introduced these two exhibits, 69 and 70, to make the motion that your Honor suggested might be entertained this morning to strike out Exhibits 52 to 64 inclusive, and 66 to 68 inclusive. We do not move to strike out Exhibit 65, which was a letter from Mr. McCarty to Mr. Cornish, to which we took no objection. I don't think there is any point in going over all the grounds mentioned yesterday.

The COURT. I have reflected upon the matter. I have not read the matter over. If it were not going to take so much time I think I would more seriously consider it, but I think we will lose more time by a motion to strike and arguing about it and then probably reversing it at a later date so that I have decided to let it alone. By that I do not mean I have made my suggestion cavalierly but I think the purpose has been accomplished in indicating we are going to scrutinize this material and receive only such documents that I think seem to be of some degree of pertinence. Some of the material in the exhibits you have mentioned suffer not so much from any test of admissibility as they suffer from plain lack of content and it is just a plain burdensome thing to read it and the reason

649a I do not want to more seriously entertain your motion is I would have to sit down and reread these letters at another time. That I really want to avoid.

650 Mr. WEBSTER. What I am afraid of, if your Honor does not act on this motion either now or at some convenient time, they will take a statement like Mr. Thompson's statement with reference to control of raw materials and say "Aha, he is talking about that Travancore, that stock of the company that had some Travancore ilmenite, or he is talking about that Brazilian ilmenite." I am not afraid of your Honor being misled by that in any way, but having had some experience with these cases before, I should be shocked, perhaps, but not astounded to find references in briefs at some time in the future of just that character, of trying to tie things together that have no

real materiality and make it difficult for us to brief the case.

The COURT. All right. I will reread them and act on your motion. I do not want to take the time to do so now. You may proceed.

Mr. LOCKE. The Government wishes to offer next, if the Court please, a photostatic copy of minutes of the regular meeting of the board of directors of National Lead Company, held November 17, 1927, and I might explain that we are skipping one exhibit as they are set up in the printed copy. We are not going to offer that.

Mr. WEBSTER. No objection.

(Plaintiff's Exhibit 71 received in evidence.)

The COURT. Is there any comment?

651 Mr. LOCKE. I wish to call the Court's attention only to the resolution that is the last paragraph on the first page and it continues on the second page.

The COURT. Beginning with "Resolved"?

Mr. LOCKE. That is right, if the Court please.

The COURT. Well, will you tell me in one sentence what these minutes accomplish?

Mr. LOCKE. It merely is a consummation of the purchase of SIT, approved by the board.

Mr. WEBSTER. I think you are mistaken. It does not have to do with that. Doesn't this have to do with Titan A/S?

Mr. LOCKE. Also we are offering it now more to show that the board approved the purchase of SIT. We will refer to it again when we get to the development of the other picture.

The COURT. Is there any comment, Mr. Webster?

Mr. WEBSTER. No comment, your Honor.

The COURT. Mr. Whitney?

Mr. WHITNEY. No, your Honor.

Mr. WEBSTER. The only comment I make is it is hitting a tack with a sledgehammer.

The COURT. I understand.

Mr. LOCKE. That ends, if the Court please, our development of the purchase of SIT. There is an allegation in the complaint that National Lead Company purchased a controlling interest in the stock of TAS. The documents are here and we will offer them now, having to do with the development of that purchase.

652 The COURT. Do they show more than the purchase itself?

Mr. LOCKE. Well, they show facts that lead up to the purchase and the peculiar circumstances attending the purchase.

The COURT. All right.

Mr. LOCKE. We wish to offer first, if the Court please, a letter from Jebesen to McCarty, dated October 2, 1926. (Government's Exhibit 72 received in evidence.)

The COURT. Is there any comment, Mr. Locke?

Mr. WEBSTER. No objection by us.

The COURT. A continuing one by Mr. Whitney.

Mr. WHITNEY. Yes.

Mr. WEBSTER. If Mr. Locke is not going to comment about it, I would like to say a word briefly about it. It is rather interesting as bearing on what I endeavored to outline yesterday on the basis of the agreements which now finds support in this exhibit; that Dr. Jebesen's company was having these financial difficulties and that the 653 business had been interfered with and that there had been a financial reconstruction of the company, and so forth, and then he comes down here:

"My investigations this summer as well as my pending negotiations with the Interessengemeinschaft have shown clearly that titaniumwhite can be more advantageously made outside of Norway than here.

"During the negotiations with I.G. the abovementioned largest shareholder and creditor has been approached by an intermediary here in Norway with the purpose of a purchase of their interest in the Titan Company."

In other words, a purchase by the I.G.

"The approach is such that a disposal of the interests is considered.

"When I was informed of this I thought it only fair to let you know and give the National Lead Company or Titanium Pigment Co. the first opportunity, and as I have received the mandate to sell their interest, I write you herewith to ask if the matter is of interest to your companies."

In other words, Dr. Jebesen was notifying the Lead Company that the I.G. was concerned with purchasing the Titan A/S. Now I submit to your Honor that had that been done then we would have had a real cartel.

Mr. LOCKE. We wish to offer next, photostatic 654 copy with confirmation by a telegram from McCarty to Jebesen, dated October 23, 1926.

May I explain to the Court that these exhibits will now run in the succession that appear in the printed document unless I make some comment to the contrary.

Mr. WEBSTER. No objection.

Mr. LOCKE. No comment on this except it is further evi-

dence of the development of that purchase, if the Court please.

The COURT. No objection has been taken, but would you mind telling me, and this is the last time I am going to put the question, supposing it does show further developments of the sale. We know the sale took place. This letter does not show anything about motive or intent or scheme. Why do you want this telegram in evidence? I am just consumed with curiosity as to why you think you want it in.

Mr. LOCKE. Our only thought was to have the elements that went to make up the whole picture, if the Court please. If they have no particular significance perhaps it would have been better to leave it out and we are studying these exhibits more carefully so we can delete those which do not add something of considerable strength to the picture.

The COURT. What you might do as you move 655 along, when you find one of these telegrams likely to prove valueless, but may subsequently prove valuable, mark it for identification, and if you find before the case is over you want to go back to one of them because it fills a gap or constitutes a color or constitutes a footnote or anything of that character, offer it then. It is a short telegram. I don't mind it. I have read it.

Mr. WEBSTER. I don't mind it either. We rather like it.

Mr. LOCKE. As I say, we are scrutinizing all these exhibits with the idea of withdrawing from the prepared development something that does not add something to the picture.

(Plaintiff's Exhibit 73 received in evidence.)

Mr. LOCKE. We wish to offer next, photostatic copy of a letter purportedly from Mr. McCarty to Jebesen, dated October 25, 1926.

Mr. WEBSTER. No objection.

Mr. WHITNEY. Mr. McCarty says they "might be interested"?

Mr. LOCKE. Yes.

The COURT. If there is no objection it will be received.

656 Mr. WHITNEY. I was wondering, your Honor, if instead of having a wasteful afternoon, we might not adjourn and let Mr. Locke come back in the morning after he has had his opportunity to go through these documents and cut them down to relevant material. He could go to work at them by two o'clock and probably be done by morning; just a practical suggestion.

Mr. LOCKE. What we start on this afternoon will be pretty well cleaned out.

The COURT. All right.

(Plaintiff's Exhibit 74 received in evidence).

Mr. LOCKE. We wish to offer next, if the Court please, photostatic copy of a letter purportedly from McCarty to Cornish, dated January 13, 1927.

Mr. WEBSTER. No objection.

The COURT. Is there any comment on it? There being no objection, it will be received.

(Plaintiff's Exhibit 75 received in evidence.)

The COURT. We will suspend at this time until two-fifteen.

(Recess until 2:15 p.m.)

657

AFTERNOON SESSION

The COURT. Have you concluded with Mr. McCarty's letter of the 13th of January?

Mr. LOCKE. Yes, your Honor.

The COURT. All right, proceed.

Mr. LOCKE. We want to eliminate the next 12 documents that have been printed up. The next one that we will offer will be dated May 10, 1928. This is a letter from Jebesen to McCarty dated May 10, 1928, and I wish to offer it at this time, if the Court please.

Mr. WEBSTER. Your Honor, I hadn't intended to object to any of Dr. Jebesen's letters, but I do object to this one on the ground of materiality, simply because it contains a lot of speculations about a company called Anglo-American Corporation which does not feature in this case in any way that I can tell; and remarks about Montecatini and ruminating about possibilities that are not alleged to have ever eventuated.

The COURT. A good deal of it is irrelevant. Which part do you want to call my attention to?

Mr. LOCKE. If the Court please, we allege in the complaint that National Lead and the co-conspirators used TAS and subsequently Tinc to organize new companies.

We also allege in Paragraph 52 of the complaint
658 that negotiations were commenced sometime prior to 1913 with the different Blumenfeld companies.

This letter is a review of the facts that existed that prompted the various actions that were taken by the conspirators subsequent to this. It casts light on almost every phase of the situation. For instance, in the next to the last paragraph of the letter Mr. Jebesen says, "There

is also the question of making use of our patents to prevent imports." There is sentence after sentence in this letter that goes to the heart of the conspiracy and we think the whole letter should be studied carefully by the Court.

Mr. WEBSTER. I submit that speculations by Dr. Jebson on what might be done under German patent laws with reference to import into Germany do not seem to have much connection with the case.

The COURT. I will take it.

(Marked Plaintiff's Exhibit 76.)

Mr. WHITNEY. I have two or three comments to make. On the first page of this there is reference to du Pont & Company, but I am sure your Honor will have observed that it is an immaterial reference.

The COURT. I rather thought you would want to call it to my attention.

Mr. WHITNEY. Yes. "I wonder why the du Pont Company, which is so closely connected with the ICI"—
659 as I told your Honor, we were in the explosive field—"has not taken a part in the company."—whatever it is.

On the next page, next to the bottom paragraph, "Montecatini"—which of course was the big Italian company—and I don't know whether it was explained to your Honor the other day that Montecatini is the name of a very great Italian chemical company, and the Societa Anonima Titan, that is apparently a subsidiary or part or branch that related to titanium—"Montecatini seems to be the most interesting because of the importance of the company and its sulfuric acid position, and it is also to be presumed that the policy of Mussolini will be in their favor."

That is the sort of thing that caused business men as early as 1928 to realize that they were not going to be very welcome trying to develop American export trade into Montecatini's territory in Italy where Mussolini would take care of you in his way.

In the next paragraph, "A fight on the basis of our patents cannot very well be started in Germany before we manufacture there." Your Honor will quickly grasp the significance of that. Unless an American manufacturer is in a position to manufacture in Germany, it is the opinion
660 of this very experienced Dr. Jebson, it is not a very good idea for him to start a patent litigation there. And that is very important in its bearing upon the

du Pont applications in Germany as they turn up later in the case.

Then in the next to the last paragraph, "There is also the question of making use of our patents to prevent imports, but this a more complicated procedure, as a lawsuit will be conducted in a country"—let us suppose that is Germany—"where the infringers do not produce"—the infringers would be producing in the United States and selling in Germany and that would be foreign trade and commerce; "and the proof being on the basis of a manufacturing process will mostly need evidence taken in another country." That would be in the United States. The great significance of that is this, that under the laws of almost all civilized countries other than our own a patent on a process gives one a right to prevent the shipment of a product that was made by that process or by any infringing process. It is precisely the opposite of our law, because the Supreme Court used to apply roughly the same law here, as your Honor knows, and then *Henry v. Dick Company* in 1912 was overruled, and the *Motion Picture Patents* case in 1915, and ever since that we have had the chain of authority that has culminated in the *Mercoid* and *Morton Salt* cases. That process

661 patent gives the patentee in this country only the right in respect of his process and not on the product thereof. But in almost all other civilized countries precisely the opposite rule applies. And that means that if du Pont produces in America and ships into Germany a product made by a process which the IG in its own country can say is an IG patented process, then du Pont's product is an infringing product in Germany and very severe consequences apply. The last point is of critical importance when it comes to the du Pont agreements in 1937 to 1941 and the whole reason why du Pont did not as a practical matter on account of political and legal difficulties ever ship into Europe. And then he illustrates it:

"I looked into this matter in Denmark last year, and understood that any evidence we wanted from Germany for a lawsuit in Denmark necessitates the aid of the diplomatic representatives."

Obviously he was there thinking of a suit in Denmark against a product manufactured by the IG in Germany and shipped into Denmark. So that this letter, which is new to us, and we haven't seen before, is of interest for the very fundamentals of the case.

The COURT. All right.

Mr. WEBSTER. There is one other thing, inasmuch as we have gone into this letter in some detail, that I
662 think is of some importance and that is, reference was made in the last paragraph to a conference somewhere in Europe of zinc manufacturers and indicates very clearly what a concern engaged in business in Europe was up against. Obviously titanium pigments had to be sold in Europe with some reference to the price of zinc and lithopone and competing products, and therefore had to take into account things that were being done by European zinc manufacturers.

Mr. LOCKE. We skip the next three in order in the printed record. The next document we purpose to offer is dated December 23, 1926; three documents we skip.

The COURT. Four pages. December 23rd, on the letter-head of Titan Company.

Mr. LOCKE. That is right, your Honor.

The COURT. You just skip one document.

Mr. WEBSTER. No objection.

Mr. LOCKE. This is a letter from Jebson to Titanium Pigment Company, Inc., dated December 23, 1926. We wish in offering this to call the Court's attention to the first three paragraphs on page 1 of the document that is offered and to the next to the last paragraph of that letter. We are offering the whole document, merely calling the Court's attention to those particular paragraphs.

662a Mr. WEBSTER. Is there something attached to that letter?

Mr. LOCKE. We are not offering that.

663 Mr. WEBSTER. Your Honor, in the second paragraph of the letter there is reference to the negotiations with the IG and the Titan Company regarding a license. Your Honor recalls from the fact that this letter was written in December, 1926, that this matter of the relations between IG and Titan Company, Inc., first originated in the form of a request from the IG for a license and there was some negotiation about it. What Dr. Jebson is saying, in pointing out that the IG, being a limited company formed by a fusion of the important German dye manufacturing concerns, is that its activities are manifold and that therefore some revision of the definition of the Licensed Field, as used, say, in the 1920 agreement would be appropriate, because of course

the IG has interests outside its title in pigment business and it is being careful in these negotiations which never culminated in a license, or at least were superseded by the contract, that the IG is saving itself from throwing all of its patents and know-how into this particular field.

The COURT. Any comment, Mr. Whitney?

Mr. WHITNEY. No, your Honor.

(Government's Exhibit 77 received in evidence.)

Mr. LOCKE. I now wish to offer photostatic copy of a letter signed by Jebesen, addressed to Evans McCarty, dated March 3, 1927.

664 The COURT. Is there any objection to this letter?

Mr. WEBSTER. Except I don't think it advances us very far.

The COURT. Probably not. Plaintiff's Exhibit 78 is received in evidence.

(Plaintiff's Exhibit 78 received in evidence.)

The COURT. Any comment, Mr. Locke?

Mr. LOCKE. Except this, that again it gives a general picture of the situation that existed, the facts that impelled these people toward the ultimate end they achieved, that is, the combination in restraint of trade. It is interesting to note particularly the paragraph where Mr. Jebesen, without challenging it, quotes the understanding with Mr. Warburg, coming to the conclusion—

Mr. WEBSTER. Where is that?

Mr. LOCKE. It is the second paragraph on page 3 of the exhibit that is printed. It is about halfway through the letter. It starts "I understand that Mr. Warburg, coming to this conclusion, considered it a great advantage that we then will have no competition with JG in the other countries, but that JG's interest with us would rather be an important advantage in these countries."

That I think points to the things that were important in the considerations and reflections of the 665 conspiracy when they made their deal which ultimately resulted in TG. That is the purpose in offering it.

Mr. WEBSTER. The comment by Mr. Max Warburg.

The COURT. I understand.

Mr. WHITNEY. Of course that only carries to my mind, your Honor, the setup that we would have had to face if we had been so foolhardy as to go into business in Germany or these countries. That is the great truth about the '30's you are reading there.

Mr. WEBSTER. Of course you understand, your Honor—

I hate to mention things that I think ought to be clear to Mr. Locke, but perhaps are not—that Mr. Warburg is talking about Germany and Central Europe.

The COURT. Well, of course I can't tell. "In other countries——"

Mr. WHITNEY. Look two pages before. He says, Mr. Warburg had quite an open eye for the imperialistic tendency of IG.

The COURT. Yes.

Mr. WHITNEY. Something about Southern and Eastern. I am just as lost as your Honor is, but reading it through——

The COURT. It might be, but I can't come to that conclusion at this quick glance.

Mr. WHITNEY. Yes. Just this next sentence—
666 neighboring countries to the east and southeast, east and southeast of Germany. And this was in 1927, when things were supposed to be very peaceful.

The COURT. All right.

Mr. LOCKE. I wish to offer next photostatic copy of a letter which purports to have been written by Mr. Jebson to McCarty, dated March 12, 1927.

Mr. WEBSTER. I have no objection to the letter.

The COURT. Any comment? Plaintiff's Exhibit 79 received in evidence.

(Plaintiff's Exhibit 79 received in evidence.)

The COURT. Mr. Locke, any comment?

Mr. LOCKE. No.

Mr. WHITNEY. I would like to ask Mr. Locke to tell me what construction he puts upon the two references to du Pont. I have to put it that way because there is no witness to ask that question, and I think it is quite ambiguous here.

Mr. LOCKE. Where is the reference?

Mr. WHITNEY. It is on page 2 in the fifth and eighth paragraphs.

The COURT. The first reference I see to it is manifestly just hypothetical and illustrative.

Mr. LOCKE. There is no intention or any suggestion that the mention of du Pont's name in this letter
667 in any way implicates them in the conspiracy.

The COURT. All right, we have that statement. Mr. Webster, have you any comment?

Mr. WEBSTER. I do wish Mr. Locke would give us some indication of what it is in this letter that he attaches some

importance to, because it might give us some idea as to whether we should take further time to comment.

Mr. LOCKE. I only make the general statement that it is a picture, if the Court please, of the situation that existed at that place at that time which prompted and resulted in the making of these various contracts that we charge are conspiracy.

Mr. WEBSTER. There is a paragraph here that I might mention, just to show the sort of problem Dr. Jebesen was up against and trying to guard against. He says on the third page of the printed copy:

"If IG should find an ideal medium to replace linseed oil for paint purposes in general and which also solves for instance our problem of chalking—shall the IG then be bound to give it to us or can IG exploit it for themselves provided they do not act in such way that we are prevented from marketing our titanium white to the producers of paints made with such a new product?"

668 In other words, Jebesen is protecting himself against a misuse.

The COURT. He is describing thoughts that are going through his mind more than anything else.

Mr. WEBSTER. Yes.

The COURT. All right.

Mr. LOCKE. We skip the next one in the printed order. We offer next, if the Court please, photostatic copy of a letter purportedly written by McCarty to Jebesen, dated March 25, 1937.

Mr. WEBSTER. I object to it only on the ground of materiality. It simply concerns some details, the arrangements that McCarty was making to send Mr. Washburn, a research man then connected with the company—

The COURT. It is the second paragraph that Mr. Locke is interested in, I take it, isn't it?

Mr. LOCKE. The second paragraph, that is right. That is the only purpose in considering this, to show that the National Lead was in sympathy with and approved the negotiations being had by Dr. Jebesen.

The COURT. All right. Plaintiff's Exhibit 80 received in evidence.

(Marked Plaintiff's Exhibit 80.)

669 Mr. LOCKE. We wish to offer next, if the Court please, copy of a letter from Jebesen to McCarty, dated March 16, 1927. There is a German telegram attached, and we are not offering that.

Mr. WEBSTER. No objection.

The COURT. Plaintiff's Exhibit 81 received in evidence. (Marked Plaintiff's Exhibit 81.)

Mr. LOCKE. The next to be offered, if the Court please, is a letter dated April 8, 1927, with a radiogram attached.

Mr. WHITNEY. How does the telegram begin?

Mr. LOCKE. "Believe best time your arrival Norway." We skipped three from the last one.

Mr. WEBSTER. No objection. You are not offering the radiogram; only the letter?

Mr. LOCKE. Only the letter.

Mr. WEBSTER. No objection.

The COURT. The radiogram is not offered. No objection. Plaintiff's Exhibit 82 will be received in evidence.

(Marked Plaintiff's Exhibit 82.)

The COURT. Any comment.

Mr. WHITNEY. Your Honor, I think you would be interested to note in passing in the last sentence, "That it is one thing to make a little titanium oxide in the laboratory and quite another thing to produce commercially a titanium pigment of high quality." 670

Mr. WEBSTER. I don't think I am looking at the same letter.

The COURT. April 8, 1927.

Mr. WHITNEY. So that, of course, when it came to producing a commercial pigment of high quality—

The COURT. I don't think that is the letter I saw.

Mr. WEBSTER. The letter I am talking about is one that relates to Mr. McCarty's trip to Norway.

Mr. LOCKE. That is the one that has been offered.

The COURT. Yes. And I was told that it is on page 139, but that can't be.

Mr. WEBSTER. I don't think I would have overlooked this little remark that Mr. Whitney has seized upon.

Mr. WHITNEY. This is the only April 8th in my book. Have you any idea where it is in the book?

Mr. LOCKE. I just skipped three from the previous one and it should be there.

Mr. WHITNEY. This one baffles me as to why it is in evidence. Otherwise, no comment.

Mr. LOCKE. It is just a follow-up, if your Honor please, to show the conferences that were had.

The COURT. All right. Plaintiff's Exhibit 82 671 received in evidence.

(Marked Plaintiff's Exhibit 82.)

Mr. WEBSTER. It shows Mr. McCarty went to Europe.

Mr. WHITNEY. Your Honor, my comment with reference

to page 139 of the book is none the less pertinent. It bears upon the need for know-how to develop this new art and industry.

The COURT. All right.

Mr. LOCKE. We skip two now. Our next exhibit is a letter from Cornish to Warburg, dated April 29, 1927.

Mr. WEBSTER. No objection.

The COURT. Is this character evidence?

Mr. WEBSTER. I wondered if it was to be taken as a testimonial for our Mr. McCarty.

Mr. LOCKE. It is just an attempt to establish the identity of the parties in the fullest sense, if the Court please.

The COURT. All right. Plaintiff's Exhibit 83 in evidence.

(Marked Plaintiff's Exhibit 83.)

Mr. LOCKE. We skip the next three documents. The next letter to be offered is a letter purportedly written from Jebson to McCarty dated August 17, 1927.

672 Mr. WEBSTER. I am not objecting to this but there is a matter of self-interest involved in this letter, apparently a dispute with Dr. Matthews over a bill for 300 marks, and finally they went to the poor man and told him that National Lead Company back in New York did not approve any such bill. And I rather hate to have these matters called to my client's attention by merely incorporating them in the record.

The COURT. Oh. "Dr. Matthews charged me 300 marks."

Mr. WEBSTER. And I hope that that is not going to be cited against me.

Mr. LOCKE. We do not offer it for that purpose, if the Court please.

The COURT. No objection. It will be received as Plaintiff's Exhibit 84 in evidence.

(Marked Plaintiff's Exhibit 84.)

The COURT. Have you any comment to make on it now?

Mr. LOCKE. I just want to call the Court's attention to the statements made having to do with an interpretation of what ultimately was resolved into restrictions on imports, starting about the third paragraph, where Mr. Jebson writes,

673 "In order to exclude misunderstanding, we beg to lay down"—

The COURT. That is not Mr. Jebson. He is quoting IG.

Mr. LOCKE. He is quoting. It appears in his letter a translation from the German. (Continuing):

"beg to lay down in writing our understanding regarding agreement D-2, Section 4."

And then from there on for another five or six paragraphs.

The COURT. All right. Mr. Webster.

Mr. WEBSTER. No, I am not going to comment.

Mr. LOCKE. We skip the next six documents. We offer next in evidence, if the Court please, a letter from Jebson to McCarty, dated November 3, 1928.

Mr. WEBSTER. I wonder if Mr. Locke would be so good as to point out what he has in mind as being relevant.

Mr. LOCKE. The whole letter again is an over-all picture of the situation as it existed, but we point particularly to the paragraph on page 3 of the exhibit. The paragraph starts, "With reference to your interview with Dr. Kuhn and Dr. Raspe". There for the first time they begin to talk about enlarging the licensed territory, or, rather, the territory by way of amendment under the 1920 contract, in the TG contract, which eventually resulted in giving to TG and IG South America. We point to that first development.

674 Mr. WEBSTER. I don't see how it could possibly be material. There was some discussion at this time about TG selling its product in Poland and Portugal. I don't know what Mr. Locke means by this over-all picture. It really is simply a picture of business men dealing with a lot of business details—costs, prices and so forth.

The COURT. Plaintiff's Exhibit 85 in evidence.

(Marked Plaintiff's Exhibit 85.)

Mr. WEBSTER. Is there something attached to your copy of that?

Mr. LOCKE. No.

Mr. WEBSTER. The translation comes off?

Mr. LOCKE. Yes. We are not offering any translation. I skip the next seven documents. The next document we offer, if the Court please, are minutes from conferences re titanium white matters delivered to Leverkusen, signed by Kuhn, Bruggemann and Jebson, dated May 3, 1930.

The COURT. Am I over optimistic in assuming that those skipped are actually abandoned?

Mr. LOCKE. Certainly for the time being, subject to a closer analysis of them and a reservation of a right to offer them at some subsequent time. The present
675 indication and inclination is that they will not be offered.

The COURT. Is there any objection? No objection. It

will be received as Plaintiff's Exhibit 86 in evidence.

Mr. WEBSTER. May I ask again if there is any particular part of this that is offered or relied on?

Mr. LOCKE. I was trying to find the paragraph in this letter where there is discussion about giving Montecatini certain rights, Montecatini being one of Blumenfeld's licensees. The consensus was that they would grant him such rights on certain conditions, that he keep away from other countries. I can't find that.

Mr. WHITNEY. Next to the last paragraph.

Mr. LOCKE. Yes. The last paragraph, if the Court please.

Mr. WEBSTER. It is objected to as immaterial. It relates to the European situation exclusively. I might say, however, that apart from paragraph 5 which Mr. Whitney called my attention to, the connection with the engagement of a secretary for Dr. Raspe, in paragraph 12 it says:

"In order to reduce patent expenses foreign patents of small importance are to be dropped."

The COURT. All right. Exhibit 86 is received in evidence.

676 (Marked Plaintiff's Exhibit 86.)

Mr. LOCKE. We offer next, if the Court please, letter written by a man whose signature I can't decipher. I think it is Hendrickson, addressed to McCarty, dated June 18, 1930, and it is on the letterhead of Titan Company A/S, with an enclosure.

Mr. WHITNEY. Your Honor, I am afraid we fall down there because the print said he could not read the first page, the first German article, so we will have to ask Mr. Locke for it.

The COURT. Are the minutes the important thing?

Mr. LOCKE. Yes.

Mr. WHITNEY. I think the black copy was illegible, but the white copy is quite legible, so that was the difficulty.

The COURT. You will have to tell me about it.

Mr. LOCKE. If the Court please, these are, as Mr. Whitney suggested, minutes of conferences in Leverkusen, re titanium matters, January 4th, 6th and 7th, 1930, recited for its reference in paragraph 6th of the minutes to the South American situation.

Paragraph 6th reads: "With regard to South America, Dr. Jebesen mentioned that the question put forward by the gentlemen of the IG could not be decided at present in view of the objection of the Titanium Pigment Company. The Titan Company is represented

in some South American countries by branches of the IG and Dr. Jebesen discloses himself ready, subject to the approval of his board of directors, to transfer to the TG m.b.h. the profit realized by sales made through these representatives."

I pointed out before that the question of the South American territory going to TG was of singular importance here, and I want the Court to be informed how that situation developed. That is the purpose of this offer.

The COURT. Any further comment?

Mr. WEBSTER. It is the contention that that simply means that Dr. Jebesen was willing to permit the IG to exercise the rights that Titan Company A/S had under the agreement of 1920 with reference to South America? Is that what it is offered for?

Mr. LOCKE. The final agreement comes subsequently. At this time, all we are pointing out to the Court is the time that the question arose, and when it becomes resolved there is evidence with regard to the details of that.

Mr. WHITNEY. Your Honor will observe that as late as 1930 these gentlemen, who were in the heart of this business as shown in paragraph 9, had in view the making of tests as to the possibility of using their standard product as a paint for indoor use. It shows that the state of the art was very, very primitive.

Mr. WEBSTER. It is objected to as immaterial.

The COURT. I will allow it.

(Marked Plaintiff's Exhibit 87.)

Mr. LOCKE. I skip the next four.

I wish to offer next a letter written by Jebesen to McCarty, dated July 23, 1931.

The COURT. I commend the political discussion at page 245.

Mr. WHITNEY. Also 243, in the middle of the page, your Honor; another paragraph in the middle of the page.

Mr. WEBSTER. There are lots of things mentioned in here. The things that occur to me, apart from the details, are that they show the perfectly extraordinary confidence that Dr. Jebesen had in titanium and his efforts to overcome difficulties in his prediction that some day titanium would overtake lithopone. It also shows great activity with reference to invention and technical investigation and so forth. I do not object to it.

The COURT. Plaintiff's Exhibit 88 is received in evidence.

(Marked Plaintiff's Exhibit 88.)

6.9 Mr. LOCKE. This again, if the Court please, is a review of all of the facts. It treats with Sachtleben, it mentions the South American situation, all being problems that were subsequently developed, all in furtherance of the conspiracy.

Mr. WHITNEY. A minor additional matter, your Honor. Your Honor may recall in the last exhibit in 1930 when they had a conference about a year before that indicated that they were going to do some tests on standard "T". Here they had a year to work. In July, 1931, at the very beginning of this letter, they only got the first product out, and that is a daily production of 40 tons. It is further evidence of the slow way this developed.

Your Honor took account of the political points, but in addition to that I hope your Honor will particularly notice on page 249 of the print in the second P.S., the next to the last paragraph of the entire document, that already in the summer of 1931 the Germans had put into effect regulations under which it is not merely a criminal offense to take money out of the country, but a criminal offense to know about someone taking money out of the country and not to inform upon them. And your Honor will appreciate that the consideration of that character, purely financial and businesswise, quite apart from the
680 political or colorful features, would conclusively prevent any prudent board of directors in America such as that of the du Pont Company from planning an invasion of the German market in the hopes of making money there. And, therefore, had du Pont after this date entered into an agreement not to compete in Germany I think your Honor would hold that it could not have been in restraint of trade. It would fall within the class of cases of the Appalachian Coal and the National Window Glass, Mr. Justice Holmes' opinion, the Chicago Board of Trade, Mr. Justice Brandeis' opinion, and the other cases in which it is held that the defendants could not enter a market anyway because the market was restrained against them, it was not an unreasonable restraint of trade for them not to enter it, or to make such agreements in respect of it as they could not otherwise make. But du Pont of course did not do that, so that there is a double string to our bow.

The COURT. I have your point.

Mr. LOCKE. I wish to offer next translation from the German minutes of a conference of September 24, 1928, at

Leverkusen, Present: Jebesen, Bruggemann and Raspe. I should like to explain that we do in this particular exhibit mean to make the notation found on the left-hand margin of the first page of the exhibit a 681 part of the exhibit.

Mr. WEBSTER. Have you any way of knowing who wrote that?

Mr. LOCKE. We think it is indicated that Mr. Charles Kaegebehn wrote it. The initials under the notation appear C.F.K., 8-7-34.

Mr. WEBSTER. If Mr. Kaegebehn wrote it we will accept that. Let us ask him right now.

Mr. KAEGBEHN. That is mine.

Mr. WHITNEY. It is not in the print.

The COURT. Yes, it is. It is in the footnote.

Mr. WHITNEY. It is a different footnote, your Honor.

Mr. LOCKE. The marginal note reads, "With reference to not continuing validity of patents."

Mr. WEBSTER. "and applications," it says. "App."

Mr. LOCKE. And "App." That is opposite the line drawn along the first paragraph.

Mr. WEBSTER. We might as well get this right. You said. "With reference to not continuing validity."

Mr. LOCKE. "contesting", that is what I meant.

Mr. WEBSTER. "contesting" is the word.

Mr. LOCKE. That is right.

Mr. WEBSTER. Of the patents and app.

682 Mr. LOCKE. The significance of the marginal note becomes apparent on reading the first paragraph, if the Court please.

The COURT. Are you going to assume that the words in quotes mean oral?

Mr. LOCKE. That is going to be our contention, if the Court please. A gentlemen's agreement.

The COURT asked if we were going to content if that means an oral agreement. I say that is going to be our contention.

Mr. WEBSTER. I must say on short notice that I do not apprehend the significance of the note or the text.

The COURT. Is there objection?

Mr. WHITNEY. No objection, your Honor, but we are not concerned in this in the slightest, but I thought I might call attention to the fact that Mr. Kaegebehn did not join their company until 1930.

The COURT. This note, that is the marginal note, is dated 1934.

Mr. WHITNEY. What they are doing is putting in Mr. Kaegbehn as a witness on what people meant in 1927. But we are not concerned. I am only mentioning that.

The COURT. Plaintiff's Exhibit 89 in evidence.

(Marked Plaintiff's Exhibit 89.)

Mr. WEBSTER. May I just finish reading the second 682a page of it?

The COURT. We will take a short recess.

(Short recess.)

683 The COURT. We are talking now about Exhibit 89.

Mr. WEBSTER. If the Court please, that marginal note which has been identified by Mr. Kaegbehn as having been made, I believe, in 1934, six years after the memorandum was written, I am now advised was dealt with in a letter from Dr. Jebson to Mr. McCarty from Paris, dated October 15, 1928, and in a response from Mr. McCarty to Dr. Jebson, dated October 24, 1928, and because of the fact that some significance may be attempted to be attached to this notion that there was some sort of an improper gentlemen's agreement, I would like to ask Mr. Locke if he has in mind offering those letters. Those are copies of letters which have been furnished to the Department of Justice but have not apparently got a subpoena number, to explain exactly what it was that Mr. Kaegbehn was referring to when he put that note there.

The COURT. Offer it to the Government. If they want to offer it all right; if not you will have a chance to do it yourself.

Mr. WEBSTER. I hand Mr. Locke the letters.

Mr. LOCKE. May I have a minute to read them?

The COURT. Very well.

Mr. LOCKE. May I suggest, if the Court please, that we consider this after we adjourn for the evening?

The COURT. You can do it either way you wish.
684 You do not have to offer it unless you choose, and if you do not choose to Mr. Webster will have a chance to offer it in due time.

No other comment on Plaintiff's Exhibit 89? (No response.) Is there any comment you want to make, Mr. Locke?

Mr. LOCKE. None, if the Court please.

The COURT. All right, let us proceed.

Mr. LOCKE. We wish to offer next copy of minutes of a special meeting of the board of directors held November 12, 1929. We have skipped two to get to this exhibit. We wish only to offer in evidence the resolution that appears at the bottom of page 49 of the exhibit as we are presenting it.

The COURT. It is all one document?

Mr. LOCKE. Yes, it is all one document.

The COURT. And you are offering all of them?

Mr. LOCKE. No, if the Court please. It is a voluminous document. There is not anything of importance except one resolution and that resolution appears at the bottom of page 49 of the exhibit we are offering.

Mr. WHITNEY. How does it begin?

Mr. LOCKE. "Resolved, that the action of Dr. Gustav Jebesen."

The COURT. I have it.

685 Mr. LOCKE. I think it might clarify it if I read that resolution.

The COURT. You may.

Mr. LOCKE. "Resolved, that the action of Dr. Jebesen, at a proprietors' meeting of Titangesellschaft m.b.H., held October 22, 1929, in consenting to and effecting on behalf of this corporation an increase in the capital of said Titangesellschaft m.b.H. from One million five hundred thousand Reichsmark (R.m. 1,500,000) to Three million Reichsmark (R.m. 3,000,000), and assuming in the name and on behalf of this corporation one-half of said increased capital or Seven hundred and fifty thousand Reichsmark (R.m. 750,000), be and it hereby is in all respects approved, ratified and confirmed, and that the officers of the corporation be and they hereby are authorized and directed to execute and deliver such instrument as may be proper to confirm said action."

The COURT. That is the only resolution offered?

Mr. LOCKE. Yes, your Honor.

The COURT. Any comment? (No response.) If there is no objection it will be received and marked Plaintiff's Exhibit 90 in evidence.

(Government's Exhibit 90 received in evidence.)

686 Mr. LOCKE. We wish to offer next copy of minutes of a special meeting of the board of directors

of Titan Company, Inc., held June 25, 1931; and as to this exhibit we wish to offer that portion which starts at page 67 of the exhibit as we have offered it, and reads:

"At the request of the Chairman, Dr. Jebson thereupon reported upon the general conduct", etc.

We want to then continue to include the two first resolutions which start, "Resolved that the various acts and proceedings of Dr. Jebson as general manager of the business and affairs of this corporation" etc.

The COURT. There being no objection, it will be marked Plaintiff's Exhibit 91.

(Marked Plaintiff's Exhibit 91 in evidence.)

Mr. WEBSTER. As I understand it, he is not actually offering all the rest of that at all; that it is being taken out.

The COURT. I suppose he offers the title to indicate what it is.

Mr. LOCKE. Yes.

The COURT. Is there any comment from you, Mr. Locke?

Mr. LOCKE. None, if the Court please.

The COURT. Mr. Whifney and Mr. Webster?

687 Mr. WEBSTER. No comment.

Mr. LOCKE. We wish to offer next a letter from Dr. Jebson to McCarty, dated March 30, 1928. We have skipped eleven documents in the printed order.

Mr. WEBSTER. This is a document of about twelve pages. I have not even read it, your Honor, it not being on our list.

The COURT. You have not any advantage of me. Without objection it will be received and marked Plaintiff's Exhibit 92. Mr. Locke, tell us about that briefly.

(Plaintiff's Exhibit 92 received in evidence.)

Mr. LOCKE. If the Court please, we are now starting our developing of the BTP picture. This is a history that Mr. Jebson writes of things that were important in the development of the problem of National Lead Company and Titan Company in the development of the titanium picture and discusses his conversations with Englishmen who eventually became contracting parties; that is as representatives of ICI and ISC, etc.

The COURT. Is there any comment?

(No response.)

Mr. REA. We have not had a chance to read it yet.

Mr. LOCKE. If the Court please, I don't want the implication to be that we have been holding out—

688 Mr. WHITNEY. Oh, no.

The COURT. There is no such implication. It is a long document and they would like to read it. You handed them a big book and many of the things in there you have not offered before today and they fell behind.

Mr. WHITNEY. We read letters until we were blind last night and many of these have been skipped today.

The COURT. I suspected as much, but it is worth the trouble. I think we have given as much time as we ought to to this. He writes in a very discursive fashion.

Mr. WEBSTER. I would like to say in passing that the charge was made that the ICI was on the point of going into this business and it constituted a threat on the competition, and in here it appears very clearly that the ICI was reluctant to take the matter up, and Major Barley said if the matter was put before their board they probably would not be interested in it now. In other words, there was not any real intention there on the part of ICI to go into this business at all. Jebson's statement that the Germans came to him is there. I don't think really there is anything else I can comment. Jebson says he really does not know anything about the Canadian situation.

The COURT. All right. Mr. Locke.

689 Mr. LOCKE. I offer next copy of letter from McCarty to Jebson, dated April 11, 1928.

The COURT. You notice the word "du Pont" in this, Mr. Whitney?

Mr. WHITNEY. Oh, yes.

The COURT. But it is not "Inc." Is there any objection? There being none, Plaintiff's Exhibit 93 will be received.

(Marked Plaintiff's Exhibit 93 in evidence.)

The COURT. Is there any comment, Mr. Locke?

Mr. LOCKE. Except for the reference to the luncheon party given by Mr. Felix du Pont, which Mr. McCarty evidently attended and enjoyed, we only want to remark about the second succeeding paragraph in which Mr. McCarty says "I have felt for some time, and I think on one occasion mentioned to you that we would probably have an opportunity to make some connection with the Imperial Chemical Industries if we desired to do so. I am not sure, however, that it would be a better connection

for us than Mr. Robinson and his friends. It is a situation in which I think we can keep our own counsel and await developments."

Then again a little further on he says:

"I think that the time has arrived for us to actively enter the Canadian market, and we are making
690 arrangements to do so."

That indicates their awareness of the entire situation and the plans that had already then been conceived.

The COURT. Is there anything you want to add, Mr. Webster?

Mr. WEBSTER. No, your Honor.

Mr. WHITNEY. I would like to just say this, your Honor will observe that there is nothing whatsoever to indicate that in either of these British or Canadian plans of Mr. McCarty he is in any way planning to have du Pont join in. In other words, a lunch is a mere social occasion.

The COURT. I do not draw any inference from the lunch and I do not think Mr. Locke intended me to.

Mr. WHITNEY. I do not either, but I go beyond that, that as he had just in mind the place that he met McGowan was at lunch given by Felix du Pont, he would certainly, had he been planning for Britain and Canada with du Pont, have referred to it, and the best evidence that they were completely dissociated is the fact that it is not in the very letter where Mr. Felix du Pont was referred to.

The COURT. There was opportunity and you claim that shows no inclination.

Mr. WHITNEY. Yes, precisely.

Mr. LOCKE. We offer next, if the Court please, a letter by Jebson to McCarty, dated October 3, 1929.

691 The COURT. All right, gentlemen. What about this?

Mr. WEBSTER. There are two or three paragraphs that I would like to refer to. It is page 340 of the print, your Honor:

"Monday I told Mr. Robinson senior confidentially, what our terms were with the I.G. and that in my opinion we should be interested in the erection of a factory in England because of the advantages it presumably has to provide the British Empire with British goods, and the position it will give us in England. We could probably

not expect to manufacture cheaper in England than on the Continent, but when putting up a factory we ought as far as it could be foreseen, ascertain that the conditions were such with regard to raw materials, labour and distribution facilities, that any competitor is not better placed and we were at least on equal foot with competition from the Continent."

Then on that same subject, on the next page, 341, at the bottom, next to the last paragraph:

"I told him that I should have mentioned the long years it had taken us to introduce the Titanium White into the English market, the conservative nature of this—we were now selling at a rate of about 2500 tons Standard
692 T p.a. and it looked as if it was"—

The COURT. Does that mean per annum?

Mr. WEBSTER. Per annum, I think, your Honor.

"and it looked as if it was a matter of price reduction to have this consumption considerably increased within a few years. Every English paint manufacturer was familiar with our material.

"Mr. Robinson said that he found it perfectly justified that we should have a compensation for this."—

Which we did get, as your Honor will recall, in the shape of those B shares.

Mr. WHITNEY. For various considerations, and the letters generally, the inference that I think proper to be drawn as bearing upon us is that they are cumulative evidence of how extraordinarily difficult it would have been for us, starting up a few years after this, to seek to penetrate these foreign markets, this British market. We have here a consideration similar to that I mentioned a half-hour ago in respect to Germany. And, of course, the charge is that we restrained trade by not exporting to these countries. This shows how impractical it was for us to do so.

Mr. LOCKE. With respect to Mr. Robinson, whose name appears now, that Mr. Robinson and his father, if that is the father, and then the son were with ISC, Imperial

Smelting, who eventually became one of the group
693 that formed the BTP. I point only to the fifth paragraph in which Jebson says that he told Robinson that "with the old friendship between him and you"—referring to McCarty—"we ought to be able to find a basis for an arrangement. Mr. Robinson said that if we

would go together with him he would be glad to do so. If we preferred to put up a factory alone he would like to see it at Avonmouth."

The COURT. Go ahead. The exhibit is in evidence.

Mr. LOCKE. We offer next a letter from Jebesen to McCarty dated March 28, 1930. Attached to that is a copy of a letter which is part of the exhibit.

The COURT. Who is the purported author of the annexed?

Mr. LOCKE. Jebesen, if the Court please.

The COURT. Is there any objection? I hear none. The exhibit will be received.

(Marked Plaintiff's Exhibit 95.)

Mr. WHITNEY. May I just state so that it appears on the record at this point that I assume when your Honor says "I hear none" you mean except the continuing one from du Pont?

The COURT. You are quite right.

Mr. WHITNEY. Thank you, your Honor.

Mr. LOCKE. The exhibit is so short we have no comment. It speaks for itself.

The COURT. No comment. All right.

Mr. WHITNEY. The only comment I have is that this is the first appearance of what your Honor will now see constantly in the exhibits—the determination in Great Britain to obtain, as they did ultimately obtain, a protective tariff. He says of the ICI that they think they will get protection. "It is exactly the same as with the Imperial Smelting, they are all out for protection, so that is that." And then your Honor will find it arose just before we get into this. That was the deathknell of any idea of breaking into Great Britain.

Mr. WEBSTER. That explains another reason why we were interested in having an investment in a factory in England instead of simply shipping to England.

The COURT. All right.

Mr. LOCKE. We offer next a copy of a letter from McCarty to Jebesen dated April 11, 1930, three paragraphs.

The COURT. Is there any objection? There being none, plaintiff's Exhibit 96 is received in evidence.

(Marked Plaintiff's Exhibit 96.)

Mr. WHITNEY. This letter prompts me to the fear lest your Honor's praise of Mr. Locke in which we all so happily join, may have had an unhappy effect, because

since that moment he has not omitted anything.
695 This thing seems pretty remote. I wonder if he is backsliding. I hope not.

The COURT. The "we shall have to do something" about England is the sort of foundation for what they propose to do and no lawyer can resist the temptation to put that in.

Mr. LOCKE. We skip one and offer copy of minutes of regular meeting of the board of directors of National Lead Company dated October 23, 1930.

Mr. WEBSTER. I do object to this, your Honor, as irrelevant and immaterial. It appears to show that the action of the officers of the company in buying some shares of ISC was approved, ratified and confirmed. I submit the fact that the National Lead Company saw fit to make an investment in ISC on October 23, 1930 long before any arrangement with reference to BTP is immaterial and irrelevant.

The COURT. What about it, Mr. Locke?

Mr. LOCKE. We do not consider it quite so immaterial. Here is one of the contracting parties, one of the co-conspirators. It is of some significance that the National Lead Company, we think, in order to further the enterprise on which they had set themselves took the precaution of buying an interest in one of the companies that could help put across the deal.

696 The COURT. It is the old quarrel between means and end. Maybe it is a means, I don't know.

Mr. WEBSTER. I think it is the same sort of means that Mr. McCarty, being acquainted with Mr. Robinson of the ISC—well, it really doesn't push any further forward on the route we are traveling. It seems to me it just clutters up the record with things that may be used prejudicially and unfairly some time later.

The COURT. 50,000 shares of common and 50,000 shares of preferred, I haven't any information yet as to whether that represents anything substantial in ISC or not. If it is substantial it might have some bearing. It may be remote.

Mr. WEBSTER. I do not believe it is claimed that it is substantial. It is really a small amount.

Mr. LOCKE. We haven't yet information as to what the actual value of it was at the time, but we are making inquiry to determine that with respect to the capitalization and the preferred shares outstanding.

The COURT. If it should appear that the purchase of 50,000 common and 50,000 preferred will entitle National Lead to have a look-see into the affairs of ISC, that might be material.

Mr. WEBSTER. Your Honor, way back in 1930? This is three years before these arrangements, and long 697 after this, as the record already shows, these Englishmen were telling Jebesen that they did not really have any interest in the subject at all. And it was at a time when they were concerned with lithopone and zinc and Jebesen was trying to sell titanium. It seems very remote to me.

The COURT. Here is the way it seems to me. In March 1930 Jebesen and McCarty get a little concerned about the English situation; one writes, I hear that they are all hot about titanium, and the other one responds, I thought they were cold on it. And the next thing I hear is that McCarty says, "Perhaps we ought to begin to think seriously about the English situation." The next thing I know is that National Lead acquires 50,000 shares of common and 50,000 shares of preferred in one of the principal English companies which might engage in the titanium business. It might be utterly meaningless and yet in its proper setting might be meaningful. I am not prepared to answer it. Objection overruled.

(Marked Plaintiff's Exhibit 97.)

Mr. WHITNEY. It comes before the President Herbert Hoover and Laval conference that was going to save the world. You remember the conference when Premier Laval of France came over to meet with President Herbert Hoover, and it was about that time. So that I am 697a sure it would be very useful for present international purposes to have all those things straightened out in this court.

The COURT. We will adjourn until tomorrow morning.

(Adjourned to December 13, 1944, at 10.30 a.m.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 89

THE UNITED STATES OF AMERICA, APPELLANT

vs.

NATIONAL LEAD COMPANY, TITAN COMPANY,
INC., AND E. I. DU PONT DE NEMOURS AND
COMPANY, INC.

No. 90

NATIONAL LEAD COMPANY AND TITAN
COMPANY, INC., APPELLANTS

vs.

THE UNITED STATES OF AMERICA.

No. 91

E. I. DU PONT DE NEMOURS AND COMPANY, INC.,
APPELLANT

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, et al.

NEW YORK, December 13, 1944, 10.30 o'clock a. m.

Trial resumed.

Mr. LOCKE. I wish to offer in evidence next a letter written by Jebson to McCarty, dated January 26, 1931, together with a typewritten enclosure signed Alfred J. Thomsen, addressed to Jebson, dated London, January 23, 1931.

The COURT. Of course the enclosure on its face reports rumor, and the writer of the information says "the information is vague in its character, but is passed on for what it is worth." So I am taking it, and I think it is correct, that it is offered as not being proof of its contents but for proof that Mr. McCarty and Mr. Jebson had heard on January 26, 1931, a rumor, true or false.

Mr. LOCKE. For no other purpose. He says in substance that they were interested in Titanium Pigment in some vague way, but that is all that it does prove.

Mr. LOCKE. We offer it for no other purpose, if the Court please.

699 The COURT. Without objection it will be received as Plaintiff's Exhibit 98 in evidence.

(Marked Plaintiff's Exhibit 98.)

Mr. WHITNEY. From our point of view these matters are welcome, and the more the merrier, because they consistently carry to your Honor that we are not in them. In other words, there is no connection.

The COURT. Very well. I do not take it that you withdraw your formal objection.

Mr. WHITNEY. Oh no, your Honor. The curious thing is because that is the ground of the objection.

The COURT. I understand.

Mr. WEBSTER. I have no comment. The Court has stated in better words the comment that I was about to make.

Mr. LOCKE. We offer in evidence next letter written by Jebson to McCarty, dated July 15, 1931, together with the enclosure therewith attached, which purports to be a memorandum re Interview with Mr. W. S. Robinson, on July 7, 1931, had by Jebson, the memorandum being signed by Jebson.

The COURT. This is, as usual, a rather long letter. Do you want to tell us very briefly, Mr. Locke, what this letter and memorandum purports to state?

Mr. LOCKE. Briefly it is a description of the circumstances under which the Robinson interests, that is ISC, found themselves as regards the titanium field and the possible development of that field, and there is reference there to the situation as it existed in Germany. All those facts I think are important in the National Lead people determining on the progress that we will show followed these conferences and this information that came to them.

The COURT. Mr. Robinson is connected with what company?

Mr. LOCKE. ISC.

Mr. WEBSTER. There are two or three things I might mention about the letter, if the Court please. At the foot of the first printed page Jebson is discussing some of the sales difficulties that they are having with Greeff and he says, "The Sale of Standard 'T' has improved somewhat in the last month, so that they reckoned the sales were the same as last year during the same period."

Then he talks about the sale of Extra "T" having gone back due to the competition with TiO_2 . That, of course, is competition with what is the pure pigment.

Then they are introducing the TiO_2 product from Leverkusen "and have hitherto sold about 40 tons. It is appreciated in the paint trade. In the rubber trade the opinion differs—some prefer the Montecatini product, 701 whereas others find our material competitive. In the linoleum trade the product from Leverkusen does not, as mentioned, give the same effect as the Montecatini product. The reason for this is under investigation."

Then there is a question of reduction of prices which is perhaps of some moment:

"Mr. Heaton expressed as a preliminary opinion, that in case we will fully compete with Lithopone in England, the price must allow a paint manufacturer to make a mixture of Standard T and Barytes of the same tinting strength,"

and so forth, and that is connected with a statement near the bottom of the page:

"The Lithopone Convention will have a meeting at that time and it may also be advisable to wait till that has taken place."

Of course the lithopone convention was in the European cartel with reference to which these companies had to operate in Europe—in competition, of course.

Now on the memo attached to the letter there are one or two things that are foreshadowed which may be of some moment. Reporting his interview with Mr. W. S. Robinson Dr. Jebesen says on the first page of the memo (page 354 of the print):

"We must count that a tariff will be imposed 702 within two years."

Of course they are worried all the time about the tariff and realized that if a tariff would be imposed it would be absolutely necessary to establish manufacture in England.

Then in the last full paragraph on that page Dr. Jebesen says:

"I explained the difference between the situation of IG re the English market by the existing arrangements with us in titanium, and their situation as lithopone-manufacturers selling in the English market for their own account, and thought no such claim could rightly be raised in our case. He was glad to hear this."

Now of course Dr. Jebesen was talking about sales by Titan Company A/S in England. That is what the reference is.

703 Then there was some talk about the compensation that Titan, Inc. at that time would receive if there was an English company. And on the next page there was some discussion of what should be paid for the English properties in business, the going concern of Titan, Inc., and there is this statement:

"There were certain matters in his letter to Mr. Cornish"—that I think is Mr. Robinson's letter—"in which I could not see clearly what he meant:

"(1) That he was afraid of being 'left out' by not having the composite pigment included—he will remember that the compensation for the same could not be agreed upon—he had not accepted the formula of eight times the profit, as he will do in case of Frickers zinc oxide business."

I think that is simply a reference to eight times the profit for the purpose of figuring the compensation that should be paid to a concern called Frickers that was engaged in the zinc oxide business in which Mr. Robinson was also interested.

The Court. That is a formula of establishing the value of the business of a going concern.

Mr. WEBSTER. That is right. This memorandum goes on and points out that of course such a formula would not

704 be appropriate in our case because there were no profits, that is, there were profits but not profits that bore a correct relation to the value of the business, and it would be necessary to take into account potential profits, and a suggestion was made either here or a little later that an opinion of chartered accountants should be obtained on that subject.

Also on the last page of this memorandum, page 357 of the print, Dr. Jebson makes it very clear that he had no authority from the National Lead Company except with reference to the titanium business, that he was not competent or authorized to speak about anything else. And in the next rather cryptic paragraph Dr. Jebson says:

"I told him I did not know how National Lead Company will look upon bringing all into one pot."

Robinson was making a suggestion there which will reoccur to the effect that it might be feasible from the English standpoint to have a company that would be concerned not only in the titanium business but also in the zinc oxide and the lithopone business, and Jebson was simply remarking that he did not know what the National Lead would say about it. As a matter of fact that was not done and the subject was not referred to—well, it was

705 referred to again but nothing was done about it. I think he suggests in the next paragraph that the same idea was suggested with reference to France, and that neither McCarty nor Pisart, whose name reoccurs through all his correspondence, and who was a manufacturer of lithopone I believe in France, were interested in it.

The COURT. No comment from you, Mr. Whitney?

Mr. WHITNEY. No, thank you.

The COURT. All right. Plaintiff's Exhibit 99 in evidence. (Plaintiff's Exhibit 99 received in evidence.)

Mr. LOCKE. We skip two of the printed list. We offer next a letter written by McCarty to Jebson, dated November 6, 1931.

The COURT. Mine is dated 1938.

Mr. REA. 1931 is correct.

The COURT. The date on page 364 should be corrected to read November 6, 1931.

Mr. LOCKE. We offer this, if the Court please, merely to show what the conditions were that the National Lead Company and the other conspirators and co-conspirators were faced with at the time these negotiations were had.

Mr. WEBSTER. Mr. Locke says what the conditions were.

The condition that Dr. Jebesen or that Mr. McCarty I believe was evidently referring to is this; he says:

706 "We are at a certain disadvantage in our English business in buying in a country that is on the gold standard and selling in one with a depreciated currency."

Now that means that Titan, Inc. was buying from TG at cost on a gold standard basis and selling in England, where at that time England had then I believe gone off the gold standard, and there was about a 20 per cent depreciation in the pound. And then he goes on to say:

"All of these indications indicate to me the desirability of manufacturing in England at an early date but I find that my associates are not entirely in accord with this idea."

The Court. Plaintiff's Exhibit 100 received in evidence. (Plaintiff's Exhibit 100 received in evidence.)

Mr. LOCKE. We offer next a letter by Jebesen to McCarty, dated November 17, 1931. We wish to call the Court's attention particularly to the statements made in this letter on the second page, under a subheading (2), "The erection of a factory by competitors," the first and second paragraphs subsequent on that page.

Mr. WEBSTER. Just one or two remarks about this exhibit to which we have not objected. Of course Jebesen revives the tariff question and all the problems
707 that arise out of that, and then on the next page,
367:

"In Germany the situation is most seriously considered as to what measures should be taken to keep up their exports.

"As the factory at Leverkusen is not yet fully occupied and in view of the low production prices, I am most inclined to think that we should still wait some time for further developments before making any decision as far as being influenced by the English tariff policy."

In other words, Jebesen was concerned to obtain under his arrangement with TG a product at the lowest available cost.

Now in the next paragraph there is a reference to Associated Lead. That, as I think Mr. Locke will point out now or later, if necessary, is a reference to Goodlass Wall—GW. And then, in case your Honor has overlooked it, in the next paragraph reference is made to National Titanium Pigment Company in England. National Titanium Pigment Company is Laporte.

The Court. All right. No objection. It will be received.

(Plaintiff's Exhibit 101 received in evidence.)

Mr. LOCKE. We offer next photostatic copy of a letter written by Robert Brown to Mr. Cornish, dated 708 November 21, 1931. Our information is that this Robert Brown was interested in some manner in the National Lead Company, but what his interest is we have not any specific information on. We offer with that as part of the exhibit a copy of a telegram to which Brown refers in his letter.

Mr. WEBSTER. I do not object to this, though the matter contained in the letter was never carried out and the plan, whatever it was, or the proposal, was completely abandoned.

Now I might amend what Mr. Locke says about Mr. Robert Brown by saying that my information is that Mr. Brown was an associate of Tasker in the Goodlass Wall Company, that he was not a person connected in any way with the National Lead Company, and I don't believe Mr. Locke has any information to the contrary. I don't know just what significance Mr. Locke will attempt some day to attach to this copy of a telegram that was sent from Mr. Tasker to Mr. Robert Brown. Of course National Titanium Pigments is the Laporte company, and it appears that the Laporte company had approached the Associated Lead Company, which is Goodlass Wall, about some sort of an arrangement that might be made between them, and some suggestion that the consideration of an arrangement would be left open for six months. Well, I should think Mr. Locke knows there was some tentative arrangement which did remain open for a 709 short period between Goodlass Wall and Laporte and then was abandoned, but we had nothing to do with it. The suggestion is made here that some effort be made to bring National Lead into this possible arrangement between Laporte and Goodlass Wall, and then at the bottom of page 371 there is a reference to the fact that Mr. Tasker proposes that the National Lead Company's contracts for ore be not disturbed. I suppose, without much basis for knowledge, that he is referring to the fact that the National Lead Company at that time had some contract to obtain some ore from the Travancore deposits. What bearing that may have on the case I can't see.

The COURT. Is there any objection?

Mr. WEBSTER. No.

The COURT. No objection. It will be received as Plaintiff's Exhibit 102.

(Plaintiff's Exhibit 102 received in evidence.)

Mr. WEBSTER. I may explain my failure to take an objection—

The COURT. You need never do that.

Mr. WEBSTER. Your Honor indicated this morning and yesterday that you thought there might be an objection on materiality, and I am not reasserting that objection simply because of the view that the Court took 710 yesterday, that while a lot of this material may not have much weight, you would rather not have to read it and rule on it at the moment.

The COURT. You are quite right.

Mr. LOCKE. We skip one. We now offer a letter by McCarty to Jebesen dated December 14, 1931, together with a telegram signed Jebesen to McCarty, dated December 2, 1931.

The COURT. What is the date of the telegram?

Mr. LOCKE. December 2, 1931.

The COURT. Not the copy I have.

Mr. WHITNEY. Page 381, your Honor.

The COURT. 378 is the letter of December 14, 1931.

Mr. WHITNEY. That is right.

Mr. LOCKE. No; take the top part off.

Mr. WEBSTER. If your Honor please, take 377 off. Mr. Locke is not offering 377.

The COURT. I haven't looked at 377. I understand now you are offering 378 and 381 together; that is the telegram dated December 2nd.

Mr. LOCKE. Yes, your Honor.

The COURT. All right. Can you tell us briefly about it.

Mr. LOCKE. This again shows the situation as 711 far as the competitors were concerned, if the Court please. And we call the Court's attention particularly to the first four paragraphs, five paragraphs, and again to the paragraph fourth at the end of the letter which starts "I do not know just how far it is wise for us to attempt" and so forth, and it goes on to say, "to go and gather all interests into one camp before starting an English factory."

Mr. WEBSTER. There are just one or two things I might mention. On page 378 Mr. Jebesen says that

"Mr. Robinson writes that there is a very wide move throughout the United Kingdom to extend local manufacturing, and Titanium is definitely included."

Of course that is the fact and really controlled to a large extent our subsequent operations in England.

Now, lest it pass unnoticed now, and be renewed at some later point, I would like to refer to the first full paragraph on 380 where Mr. McCarty says—by the way, I referred to Mr. Jebesen saying that Mr. Robinson writes, with reference to 378, but I meant that Mr. McCarty refers to what Mr. Robinson wrote him.

The COURT. All right.

Mr. WEBSTER. And again on 380 he says:

“As I wrote you some time since, we have again been approached by Mr. Chase and his associates on
712 the subject of an arrangement with respect to the Blumenfeld patents. These gentlemen would like to secure a working arrangement in the United States, and in order to get it are willing to be of any assistance they can in helping us to secure a similar arrangement in Europe. They claim that they have no interest in the European situation whatsoever. I understand that there is a possibility that Mr. Blumenfeld may be in New York on his way back from Japan before the end of this month, in which case an opportunity will be afforded to discuss the matter of his personal interest with him. I have told Mr. Chase that this was his part of the project, and we would await some definite suggestion from him.”

Now, Mr. Chase was a man with whom Mr. McCarty was acquainted, but the fact is that we never made any arrangement with Mr. Chase or his associate Ticknor, and I think the facts concerning that may perhaps develop later.

Toward the bottom, Mr. McCarty says:

“In connection with the negotiations with Mr. Robinson, it will interest you to know that we have decided not to join him in his lithophone and zinc white businesses.”

That is what I referred to a few moments ago.

713 The COURT. Very well. No objection. It will be received as Plaintiff's Exhibit 103.

(Plaintiff's Exhibit 103 received in evidence.)

Mr. LOCKE. We offer next photostatic copy of a letter written by McCarty to Robinson, dated December 15, 1931, and in this letter we wish to call the Court's particular attention to the paragraph that appears the fifth from the end, which reads:

“Another question for us to decide is whether we wish to make an attempt to bring the several groups of patents under one control before embarking on the enterprise. This may be possible, but it is likely to delay matters, and it

may be better for us to make a start and deal with competing interests later."

The COURT. Who writes this letter?

Mr. LOCKE. McCarty.

The COURT. To Robinson.

Mr. LOCKE. Yes, your Honor.

Mr. WEBSTER. There is one thing that Mr. Locke has not referred to. There is quite a bit of reference throughout this correspondence with Mr. Robinson about Mr. Robinson's ability to supply certain facilities to a British titanium manufacturing enterprise, and refers throughout to a factory site at Avonmouth. The patents
714 that may be referred to, although I submit that the reference is entirely speculative that Mr. Locke has referred us to, is, well, possibly a reference to some Blumenfeld patents, and what might conceivably be done about them in England. As far as I can tell, it hasn't any relation that it might be in the United States.

Mr. WHITNEY. I am sure your Honor is fully aware of it but to be doubly sure the paragraph that Mr. Locke referred to of course is confined to England. Mr. Locke, I observed, called your Honor's attention whenever there is a naughty word in the papers, notably the word "control." Well, it is a curious fact that the same law of restraint of trade has developed in what might be called the opposite direction in England. It is there permitted for all the companies to combine together if they wish to do so, although the Government through the Board of Trade exercises supervisory control in the event they then find the prices are too high. I think it is really the result of scarcity economy where they can't afford the luxury of unrestrained competition. But so far as du Pont is concerned, who were interested in the American market, it is a matter of no relevance as to whether or not there is an attempt being made in England, within English law, to control
715 in England. Of course by someone else other than ourselves.

I just wanted to make sure that your Honor was clear that it does not prove anything even prospectively along the lines that we were discussing yesterday morning, that there should have been in these early years or at any time some discussion looking to a grouping in England, unless only we later enter into that grouping for the purpose of preventing the English manufacturers selling into the United States.

716 The COURT. Or with knowledge thereof?

Mr. WHITNEY. Yes.

Mr. WEBSTER. Of course they actually did not do what Mr. McCarty was speculating upon. What happened I think, to be quite frank with your Honor now, inasmuch as this has been the subject of some discussion, is that subsequently in England, with reference to English trade, over which presumably they still have some measure of control in the making of a quota arrangement with Laporte, that is what happened.

(Plaintiff's Exhibit 104 received in evidence.)

Mr. LOCKE. We offer next a letter written by Jebesen to McCarty dated January 4, 1932. There appears to be a page attached to that letter with a caption "Freight rate from Avonmouth." We do not offer that in evidence.

We wish to call the Court's particular attention to a paragraph—

The COURT. You do not offer the schedule?

Mr. LOCKE. That is right.

We wish to call the Court's attention to the seventh paragraph which reads:

"It will of course be unfortunate if an English titanium factory should be erected by competitive interests, and the idea with the British Titan Product Company—as a sign that we intend to put up a factory in England—not meet the purpose."

Mr. WEBSTER. I may say I am somewhat startled by Mr. Locke's concern over the competition within England.

There are one or two other things about the letter that perhaps merit reference.

The COURT. Before you go any further I would like somebody to translate that paragraph which Mr. Locke read.

Mr. WEBSTER. Perhaps he will translate it before I go on.

The COURT. What does that mean?

Mr. LOCKE. If the Court please, there has been evidence already introduced, and there will be further evidence, that the National Pigment Company or Laporte interests were then contemplating building a factory—

The COURT. But what do the words "and the idea with the British Titan Product Company—as a sign that we intend to put up a factory in England—not meet the purpose" mean?

Mr. LOCKE. Our construction is that they had then organized the British Titan Product Company. It was merely a name, a corporation. The purpose of organizing it was as

718 a threat, or to be used as a threat, against competitors of the National Lead and others interested that they were going into the titanium business and so discourage the competitors from developing their plant.

The COURT. He says, "It will of course be unfortunate" if this ghost plant did not serve the purpose of frightening off competition.

Mr. LOCKE. That is right.

Mr. WEBSTER. Of course they did erect such a plant and it ceased to be such a ghost, but I suppose if all the hundreds of certificates of incorporation that are filed each week at Albany were searched for possible competition, ghosts, lawyers and their clients would go mad.

But I would like to refer to a paragraph on the first page:

"Personally I am at present inclined to think that when the economic war is over—"

Dr. Jebsen was a great optimist and not only thought the economic war might be over, but in one of his letters which I believe we already have in evidence, or will have, writing from Paris in 1941 he says, "Of course the Germans will be thrown out of Norway in a few weeks." Some of his predictions were of about that character of optimism which I think shows a pleasant character but not altogether accurate.

719 He says: "Personally I am at present inclined to think that when the economic war is over, we may find the various important European countries with moderate tariff barriers."—this is interesting as to what did happen—"which make it advisable to erect factories in markets like England and France when these markets are sufficiently developed. This development has, as you know, not been so rapid as it looked like some years ago and, although there may be a general change in 1932, we need also a considerable increase of the sales before this point is reached. In the meantime, it will probably be more economical to base ourselves on the factory in Leverkusen, which is not fully occupied."

In other words, he was acting as a business man might be expected to act as distinguished from predicting what might happen of the predicting what might happen politically.

The COURT. Leverkusen of course was TG's plant.

Mr. WEBSTER. That is right, yes, sir.

He says at the bottom of page 386 of the print:

"It is difficult to understand that the Associated Lead

Manufacturers will start a titanium manufacture, knowing as we do, what it costs to get a factory well
720 operating as to time and money,—and with us as competitors.”

Dr. Jebesen was not only an optimist but he had confidence in his ventures and he thought the threat would not be the fact that a company had been incorporated as a ghost but that it was going to make a showing in England.

Then he talks over here about Laporte. I think that is fairly interesting. It is on printed page 387:

“Laporte’s position in Luton seems to me not favorable for a titanium factory—it being in the middle of the country, with extra costs of transport for incoming materials and probable difficulties with the disposal of our sulfuric acid—Iron Sulphate solutions.”

In other words, Dr. Jebesen was sizing up the business situation in a characteristic way.

Now on page 388 he refers again to the Commercial Solvents’ interest in England and says:

“Commercial Solvents’ interest in England was, according to Blumenfeld, limited so, that they could do nothing without him. It seemed, though, that Commercial Solvents had some rights to Blumenfeld’s English patents.”

Now I think if Mr. Locke is acquainted with the
720-A fact that he ought to tell the Court that that just is not true; that there would be nothing in the record to show that that is true—that Commercial Solvents had any rights to Blumenfeld’s English patents.

Now just below that he says:

“Montecatini entered, though, also into the picture, as it had a right for some years to export to England.”

721 I just pause to remind your Honor that Montecatini was exporting to England and it was operating under the Blumenfeld patents.

Now an interesting—I say “interesting”, but I sometimes wonder if these things have any general interest. Perhaps we can make them interesting in this case or Mr. Locke will help us to make them interesting. They do not seem to be interesting in the sense they push us forward on the road toward a decision, but they have to be mentioned; otherwise these letters will rise to haunt us in the form the Government uses them.

“On Mr. Ticknor’s and Mr. Chase’s suggestion, based on their talks with Donegani, it was assumed by them that Donegani would accept a certain arrangement. When I met Donegani with Blumenfeld—”

Donegani I take it is the Montecatini man—

“it appeared, though, that Donegani demanded considerably more and seemed to have no regard for his agreement with Blumenfeld, as this has been represented to me by B.” (which I assume is Blumenfeld) “Blumenfeld did not seem to have sufficient strength to keep Montecatini to their agreements, and suggested that we should make an arrangement with him and fight Donegani together afterwards. I declined to buy a lawsuit, and

722 the other alternative was to try to conciliate the two. Mr. Burton made an attempt with not much result. I would not follow their suggestion to go between.”

In other words, here was Jebesen recognizing here a situation in which he had no legitimate interest, and not permitting Blumenfeld and Donegani, who had relations in the deal, to use him as a sort of mediator to bring some sort of order out of their particular chaos.

So this helps to explain, however, the arrangement which they made later in Europe affecting Montecatini and Blumenfeld and so forth.

The Court. It will be received.

(Plaintiff's Exhibit 105 received in evidence.)

Mr. WHITNEY. If your Honor please, there is one part of this letter which is useful for an understanding of the du Pont problem in this case. At the bottom of page 389 Mr. Jebesen says:

“Mr. Ticknor”—that is of the Commercial Solvents Company—“said to me last Autumn”—that would be the Autumn of 1931—“that Mr. Ewing, du Pont's representative in London, would see Donegani this Autumn”—

that is talking in the Autumn of 1931 he tells Jebesen
723 Mr. Ewing would see Donegani in the Autumn of 1932—“and, as du Pont has many points of interest together with Montecatini”—which, as I mentioned the other day, is the largest chemical company in Italy—“Mr. Ewing might influence him.”

The speculative character of that will be apparent, your Honor, from every point of view.

“It seems to me that Commercial Pigments or du Pont are nearest to clear up the matter between Blumenfeld and Montecatini.”

Now, as usual, how speculative that is in July of 1931. Du Pont had acquired a 70 per cent interest and Commercial Solvents a 30 per cent interest in Krebs, and for all that appears here Dr. Jebesen knew nothing about it at all; because it was Krebs that was operating in the United

States at that time and had been for many months, and he goes on writing in this interesting but irresponsible and chatty way with his American associate about what he is thinking about as the years roll by in London.

The next sentence:

"They must have a clearer view of the relations between the two, and should have influence with both."

That is influence with the French gentlemen of 724 Mr. Blumenfeld who had made these other inventions, and Montecatini. What the influence was for does not appear. Then comes the critical sentence:

"If du Pont took over Blumenfeld's European interests, we would have some more responsible people to deal with."

There you have Jebesen speculating in conclusion that if only du Pont would come over there and take over Blumenfeld's interests they would have more responsible people to deal with. The short answer to that is that that never happened, or anything like it. And this is written in January of 1932.

Now the Government has an exhibit that shows that in October of 1932, ten months later when a du Pont vice-president, Mr. Pickard, was in Europe on general du Pont matters, he was brought into a conference with Mr. Donegani of Montecatini, and this Mr. Ewing, the du Pont representative in London. In other words, everything to which this paragraph related by way of speculation headed up into that conference ten months later, and Mr. Pickard said that any suggestion of du Pont entering into this European-Blumenfeld-Montecatini relations must be completely repudiated; that this would be absolutely illegal according to American laws and therefore du Pont

would not be interested regarding this price agree- 725 ment in Europe which would take place between European producers. Du Pont was precluded from taking any share in it due to American laws.

The COURT. That exhibit is not yet in?

Mr. WHITNEY. No, but doubtless it will come in. And it just puts the quietus on this speculation which comes up here, and it is characteristic of our problem here. What got us into this is speculations in London and Paris against the background of countries where there are no antitrust laws, and about "if they could only go over and get du Pont to do these things," and then one finds there is nothing to it.

Mr. LOCKE. I should just like to say this in answer to

Mr. Webster's challenge that we develop our full theory of the whole case as we offer each successive exhibit.

The COURT. You are not obliged to answer anybody's challenge.

Mr. LOUKE. I am hopeful we have discussed the exhibit sufficiently so that the Court might have an understanding of the purpose of the exhibit as it relates to the case up to the point where we have at this time developed it. True evidence of all of these facts that both Mr. Webster and Mr. Whitney have discussed will appear in the 726 record, but I have not seen fit to discuss them until they get into the record being afraid of the challenge I would get from these two gentlemen, if I did.

We next offer a letter from Mr. McCarty to Jebsen dated January 8, 1932, and call the Court's attention to the fourth paragraph which reads:

"It may or may not be possible or desirable for us to clear up the patent situation before we start. Nothing has been heard from Mr. Blumenfeld since my last letter to you on the subject, and yesterday I suggested to Mr. Chase that he attempt to formulate some proposal for the rights to the Blumenfeld patents in England so that we might have something definite to begin with. I fear that the European situation is too complicated for us to deal with all countries at one time."

Then again, if the Court please, in the second succeeding paragraph it reads:

"We have no desire to have the "Associated Lead Manufacturers share in the management of the English business, but should we form an English company it might be wise to allow them to participate to a small extent as they are large potential buyers as well as potential competitors.

In addition to this they are largely interested, as 727 you know, in Hopkins & Williams Travencore, Ltd."

The Court will remember they were the owners of ilmenite deposits.

Mr. WEBSTER. I fail to see the significance of the paragraphs my friend referred to, but I leave that to your Honor. Mr. McCarty again says:

"My own opinion is that we will sooner or later we will have to have an English factory if we wish to maintain our position in the British market, and that the necessity for it may come sooner than some of us now anticipate."

I think the next paragraph is important where it says: "yesterday I suggested to Mr. Chase that he attempt to formulate some proposal for the right to the Blumenfeld

patents in England so that we might have something definite to begin with,"

which simply means that McCarty thought that Chase might have some influence with Blumenfeld. I think that is the only significance that can be attached to it and is in accordance with the fact.

The COURT. I suppose Mr. Locke sees in it the early budding of the plant which grew into the Blumenfeld-Barton-Rossi coagulation.

Mr. WEBSTER. I do not think that coagulation
728 ever occurred.

The COURT. Well, whatever did.

Mr. WEBSTER. But he may think that is what it shows.

The COURT. All right. Any further comment?

There being none, Plaintiff's Exhibit 106 will be received.
(Plaintiff's Exhibit 106 received in evidence.)

Mr. LOCKE. We offer next a letter from McCarty to Judson, dated January 12, 1932, and call the Court's attention to the second paragraph which reads:

"Although I have not compared them carefully the agreement dealing with the license appears to follow the lines of the agreement of 1920."

That emphasizes the fact that the primary concern of the National Lead was to have all their future dealings rest on and conform to all terms of the 1920 agreement.
(Plaintiff's Exhibit 107 for identification marked.)

Mr. WEBSTER. No objection; no comment.

Mr. WHITNEY. Now, your Honor, I welcome that statement by Mr. Locke. It is one of the most helpful statements that has been made. He said, "We take the position that National Lead wished all these agreements to rest upon the 1920 agreement." And a great prob-

729 lem that your Honor mentioned yesterday morning, and is going to grow as we go along, is the effort to define what is the partnership or enterprise, to use two of the words your Honor referred to yesterday, because the question is going to be for us, did we or did we not enter into the partnership or the enterprise. Mr. Locke has now again very tersely defined it. The enterprise is to create a situation that will, as he says, rest upon the terms of the 1920 agreement. I would offer to your Honor a test of this all the way through, as to whether we enter into the terms of the 1920 agreement at any time.

The COURT. Exhibit 107 will be received.

(Plaintiff's Exhibit 107 for identification received in evidence.)

Mr. LOCKE. We offer now a copy of the minutes of a regular meeting of the board of directors of National Lead Company, dated February 18, 1932.

(Marked Plaintiff's Exhibit 108 for identification.)

Mr. WEBSTER. No objection and no comment except to say that this is not the proposal that was carried out.

The COURT. That is the formation of the company?

Mr. WEBSTER. That is not the proposal for capitalizing the company that was carried out. It was one of the preliminary suggestions.

730 Mr. LOCKE. This is merely offered to show the awareness of the officers of the company of the actions of Mr. Robinson who eventually became president of BTP.

The COURT. It will be received.

(Plaintiff's Exhibit 108 for identification received in evidence.)

Mr. LOCKE. We offer next copy of a letter from Jebson to McCarty, dated February 18, 1932, and call the Court's attention to the second and third paragraph on the first page and to another paragraph, seven or eight paragraphs further along, which starts "Considering the advantages and disadvantages I believe an arrangement on the above lines is interesting to us".

Then the next paragraph, which reads:

"It does not appear from Mr. Robinson's conversation that he would be willing to give us a price for sulfuric acid cheaper than what may be considered reasonable in consideration of the quantities we may consume," and the rest of the paragraph. And also the next succeeding paragraph:

731 "If a combination with these two companies prevents anybody else from entering the industry—anyhow on a basis representing serious competition—it can be worthwhile to have them as partners also in view of the strength and influence they otherwise can exercise."

May I explain there is a final page attached to that exhibit, but we do not offer that—a schedule of "Deliveries to Customers."

Mr. WHITNEY. While Mr. Webster is looking at it and while your Honor has that last sentence fresh in mind, I would just like to thank Mr. Locke and tell him I think I will put that in verbatim if we ever have to write a brief.

The COURT. "If a combination"—in England—with these two companies prevents anybody else from entering the industry—anyhow on a basis representing serious competition—it can be worthwhile to have them as partners also in view of the strength and influence they otherwise can exercise."

Mr. WHITNEY. Not merely these two companies—did of course enter later into this partnership in England—all these companies did—but this shows that we are an American manufacturer confronting that letter and would appreciate not only the ostensible elements, but also what might be called the otherwise elements. They are pretty strong in England.

732 Mr. WEBSTER. I mention first that I note at the top of the page Mr. Cornish has a copy of Dr. Jebson's letter which is in longhand. I just make that note for the record. It might become of importance.

Now on the next page there are some rather interesting remarks concerning the attitude of the British industry or the British people and the Government. There has been some discussion as to the division of control, and in addition to that some discussion of the compensation that Titan, Inc. was to receive for its going concern. On this question of control Dr. Jebson says:

"I told him that I personally would prefer to have 51% interest as I thought this would be of advantage to all on the point of your management, but I did not make it a condition."

That is, he thought this might be arranged by voting shares.

"He mentioned that I.C.I. might say that this being a British industry, the majority ought to be in British hands. On my reaction that that would be the end of our negotiations he expressed the view that we might always talk about it. We finished up that he would say to the I.C.I. that there was an opportunity for them and him to make an arrangement with us on the basis of 50:50 interest."

733 Now that is related to the statement that Mr. Locke already mentioned on page 403, and which he did not read the whole of:

"Considering the advantages and disadvantages I believe an arrangement on the above lines is interesting to us. Apart from both companies' general position it will represent a combination with the two most important sulfuric acid manufacturers in England who can, presumably, make acid cheaper than anybody else—I.C.I. in Billingham

and Imperial Smelting Corporation in Avonmouth."

So that Jebson was looking out again for the cost.

Now there is one other thing which this either expresses or clearly foreshadows and that is that it was the policy of the British Government at that time that companies like I.C.I. and I.S.C. should not divide in their consideration of new English enterprises of this character but that they should consider each other's interest and the public's interest in taking up a new industry like titanium pigments. That will be borne out, if not completely borne out, by this other correspondence which I expect Mr. Locke to offer later.

733a The COURT. Exhibit 109 will be received.
(Plaintiff's Exhibit 109 received in evidence.)
(Short recess.)

734 Mr. LOCKE. We offer next copy of a letter from E. J. Cornish to Dr. Jebson dated March 5, 1932 and call the Court's particular attention to the third paragraph of this letter which reads:

"I would not like to make any arrangements whatsoever with people whom I would distrust if they had more than one-half the stock. If there is any reason in the laws or customs of England to preserve the theoretical control of the company in people living in England, I know of no reason why we should complain of that condition at this time. I therefore would not make it a sine qua non that we must have 51% of the stock—or even more than 49%—if the laws of England make that desirable."

That is just by way of explanation of—

Mr. WEBSTER. I might comment on that if I may.

The COURT. If Mr. Locke has concluded.

Mr. WEBSTER. I think it very fair of Mr. Locke to offer this letter and I would like to read the remainder of the letter. Mr. Cornish says:

"I think that the sales that they have been making in England, and the profits made thereon, justify the demand for £125,000 for the good will and knowledge of our people. The losses suffered in this business"—this
735 is 1932, if your Honor please—"in learning about its various conditions, our ability to overcome those losses and reduce the cost of making titanox from 28¢ a pound to its present price, entitled us to a fair compensation for that experience which would become available to a newcomer."

Yesterday I referred to a drop in the price of titanox from 18 cents to 10 cents and I must have been mistaken

about that, because here is Mr. Cornish talking about a drop from 28 cents to I think less than 10 cents, as shown by that exhibit we had talked about yesterday, and referring to the losses that were incurred in order to bring that about.

I do not know just what significance Mr. Locke attaches to this next paragraph, wherein Mr. Cornish says:

"I would not like to make any arrangements whatsoever with people whom I would distrust if they had more than one-half the stock. If there is any reason in the laws or customs of England to preserve the theoretical control of the company in people living in England, I know of no reason why we should complain of that condition at this time. I therefore would not make it a sine qua non that we must have 51% of the stock—or even more than 49%—if the laws of England make that desirable."

736 I don't know about the laws of England but it is certainly not suggested in this letter that Mr. Cornish has any doubt these English companies. He simply says that he would not like to have less than half the stock if they were people whom he distrusted.

The COURT. I see no more in this than simply the mental development of the arrangement which resulted in a particular stock distribution. History, yes, but not very material.

Go ahead. Plaintiff's Exhibit 110 is received in evidence.

(Plaintiff's Exhibit 110 for identification received in evidence.)

Mr. LOCKE. We offer now a letter written by Jebson to Edward J. Cornish dated April 7, 1932, to which is attached a copy of a letter written by L. B. Robinson to Dr. Jebson dated April 4, 1932.

Mr. WEBSTER. Your Honor, there are quite a few long-hand notes on the photostatic copy of the letter, and I assume that Mr. Locke is not offering any of those and that they should not be contained in the print.

The COURT. They are not contained in the print, are they?

Mr. WEBSTER. They are not contained and I assume that they should not be contained in the print and
737 are not offered.

Mr. LOCKE. They are not offered, your Honor.

The COURT. Very well. This being one of Dr. Jebson's letters, you had better tell us very briefly what it contains.

Mr. LOCKE. I think I can read very briefly and as quickly as I can tell the Court the third paragraph:

"It is of course not chiefly the patent situation which should be taken into account by the I.C.I., but our total position in the titanium industry, our sales and goodwill in the English market and our many years' experience from manufacture on a large scale.

"I hope and think the I.C.I. will realize the fight they will have with us in case they want to take up the titanium industry with no agreement with us."

Then, skipping a paragraph:

"If their reference to several of our basic patents expiring in a year or two, means that we should have to reckon with lower profits, it should be remembered that the profits I have taken as a basis are in ratio to the profits from lithopone, or even lower, and a reduction of the titanium profits would presumably lead to a still larger proportion of the lithopone business to be taken by titanium."

738 Then reading from the letter attached, Mr. Robinson's letter, the third paragraph:

"With regard to titanium white, for instance, our conclusions show that 6000 tons of pigments could be provided for by an investment of the order of £150,000 which would not justify a scheme on the scale put forward by Dr. Jebesen. The point, therefore, arises, would the National Lead Company agree to a scheme which was capitalised on the actual requirements of the situation and which would take into account the fact that the patent situation in this country becomes extremely weak by next year."

The COURT. Mr. Webster, have you anything to add?

Mr. WEBSTER. Well, of course the patent situation did not become weak, and Major Barley who is being quoted here as the authority for that was not an authority. The reference to the capital arrangements I think is simply a suggestion that it would be prudent instead of raising a fixed amount to raise an amount that would seem to be sufficient for the time being and then have arrangements for further calls or credit later.

Now in connection with a matter that has been mentioned before, there is a paragraph on page 409 which says:

739 "It may interest you Major Barley called on me"—this is in Dr. Jebesen's letter—"in Norway in 1924 or 1925, to the purpose of I.C.I. taking an

interest in titanium at that time. I told him then that it was too early to start a factory in England and he asked me to keep in contact with I.C.I. and remember them when we thought the time was ripe."

Well, the approach was from I.C.I. to Jebsen, back in 1924 and 1925, and this present correspondence was the ultimate consequence of that.

Mr. WHITNEY. Just a brief word, if your Honor please, upon the bearing of the patent situation in England upon this case. Mr. Locke has read two paragraphs from the two letters which cause one to infer that he considers it part of the Government case to establish in respect of England what would perhaps make a case in favor of the Government were it established in respect of the United States, to wit, that a proposed joint agreement between two or more large competitors cannot be supported upon the basis of their total position in the industry or their sales and goodwill when they admit that it is not chiefly the patent situation upon which they propose to support it. Or, more simply, that he is pointing out that he has contemporaneous evidence which Mr. Webster has criticised as to its expertness to the effect that the patent defense was dying in England.

740 Now that is, with great respect to Mr. Locke, a total misconception of the Sherman Act. The point of the American banana case, a unanimous decision of the United States Supreme Court, written by Mr. Justice Holmes, was that even where the United Fruit Company procured the Costa Rican Government to drive the poor little American banana company out of its vineyards by sending in a file of soldiers was no concern of our courts under the Sherman Act. That is as far as this goes—it is talking about something inside England, a proposal inside of England in accordance with the law of England to have two or more large English companies combine in their efforts, notwithstanding that they have a weak patent situation in England.

Now the point at which a question of that sort becomes relevant to an American proceeding under the Sherman Act is illustrated by the Sisal Sales case in the Supreme Court in which it was proven as a fact that the Equitable Trust Company in New York and a group of other importers of Sisal entered into a conspiracy and made an agreement to take all the sisal in Yucatan, Mexico, off the market so that they could sell at a high price in the American market the sisal which they landed here when

they had taken over the stocks of companies that they had to liquidate as bankers. And therefore, there was proven the intent of the American group directly to stop imports into the United States by the means of buying up all the sisal available in Yucatan, where our sisal comes from, and holding it here; so that although the act was local in Yucatan the purpose with which the act was taken was in order to take it off the market in the United States. Present Circuit Judge Augustus Hand decided wrongly in that case through an inadequate understanding of the banana case, relying upon the banana case, and the Supreme Court, which was to a large extent the same court that decided the banana case, pointed out the distinction clearly.

Now this has none of the elements of the sisal case.

The COURT. If you mean by "this" this document—

Mr. WHITNEY. Exhibit 111.

The COURT. I say on this exhibit there would be no argument. I don't think Mr. Locke would dispute that with you. But I assume Mr. Locke would respond to you and say that this is a case of the banana case plus an intention to keep the poor little banana fellows out of the United States, plus an agreement to keep them out, plus the policing by United Fruit that they should stay out, plus an agreement by United Fruit to stay out of the little fellow's place and not to compete with him. I suppose he would say that is what makes his case.

742 Mr. WHITNEY. That would be right. Now my conclusion simply is that your Honor will have observed that although we had entered this business in 1931, almost a year before this, through our investment in Krebs in America, there hasn't been and there won't be a word in any of these documents to suggest that second element.

The COURT. As far as du Pont is concerned.

Mr. WHITNEY. Yes. And that is what we will be looking for, and when it comes it has got to be much more than a word; it has got to be some facts.

Mr. WEBSTER. If the Court please, I subscribe to all of what Mr. Whitney says except in answer to your Honor "that will be right" or "that is right." Of course I have had in mind at some appropriate time discussing this question with the Court but had thought it would be premature to do so now.

Having said that, and having a reservation of that discussion, I might add by way of a personal note that Mr. Whitney has good reason to be proud of the sisal case

because, while it may not appear from the report where his name is, perhaps third or fourth in line of counsel, having been his successor in office in the Department of Justice at the moment that that case was argued, I happen to know that he wrote the brief.

743 Mr. WHITNEY. I think his Honor will take judicial notice that customarily the last name on the brief is the one that does the most work.

The COURT. I thought that was the usual rule.

Exhibit 111 in evidence.

(Plaintiff's Exhibit 111 for identification received in evidence.)

Mr. LOCKE. We offer now the letter from Jebson to Major Barley dated April 27, 1932.

Mr. WEBSTER. I do not object to it but I would appreciate Mr. Locke telling what parts of it he thinks are material.

Mr. LOCKE. The material parts occur under the part of the letter that has a sub-heading "Period," starting there, and particularly under that heading, some seven or eight paragraphs later, where this paragraph appears: "The agreements provide"—he is now discussing other agreements, the provisions of which are made a condition for the agreements in connection with BTP—

"The agreements provide that export of products within the Licensed Field outside the territory of the licensee cannot be undertaken by the licensee"—

The COURT. Are you reading from the section entitled "Period"?

744 Mr. LOCKE. Oh, I was in error. That was under the paragraph entitled "Licenses." I skipped one that I want to call the Court's attention to. Under the sub-heading "Licenses," the third paragraph begins:

"In order to avoid competition and friction, it was agreed that each company should confine its activity of manufacture and sales to a definite territory; the Titanium Pigment Company to North America and the Titan Co. A/S to Europe, Asia, Africa and Australia. As regards South America, this was left open for both companies."

And then skipping eight paragraphs we come to the paragraph that I started to read:

"The agreements provide that export of products within the Licensed Field outside the territory of the licensee cannot be undertaken by the licensee which also shall endeavour to prevent its customers from doing so."

The next paragraph goes on:

"Articles manufactured by the customers of the licensee can be freely"—

The COURT. Wait a minute. Is this supposed to be descriptive of one of the agreements now in evidence?

745 Mr. LOCKE. No, if the Court please. These are negotiations, these were discussions had in anticipation of the execution of that agreement, and these were conditions that were offered to Major Barley as necessary elements to be incorporated into the BTP agreement.

Mr. WEBSTER. No. I think Mr. Locke is mistaken about that. He says, "I beg to quote the definition of the Licensed Field agreed upon with the I. G. Farbenindustrie," and then he goes on to say, "The agreements provide"—and I suppose he is referring—

The COURT. He is referring to the IG agreement.

Mr. WEBSTER. I assume he is talking about the IG agreements. And the top of page 417 and the bottom of 416 indicate the same relation.

The COURT. Is there anywhere where he suggests that the British should enter into an identical arrangement?

Mr. LOCKE. In the second paragraph of the letter:

"National Lead Company is willing to co-operate with Imperial Chemical Industries and Imperial Smelting Corporation in the development of a titanium industry in the British Empire on the following basis:"

And then with an uninterrupted continuity he suggests the various terms and conditions.

746 The COURT. All right. Plaintiff's Exhibit 112. (Plaintiff's Exhibit 112 for identification received in evidence.)

Mr. LOCKE. Our next exhibit is a letter written by Jebson to Cornish dated April 29, 1932. With reference to this exhibit we call the Court's attention to the third page, the paragraph appearing after the tabulation of "Net Profits," some 10 or 12 paragraphs long, which paragraph reads:

"I have the impression that it is not the intention of the I.C.I. to start in competition with us in case we do not come together, as they have their hands otherwise full up and will hesitate to make a fight—the matter not being of sufficient interest to them in such case, at the present. I believe, though, that, as time goes on, their interest in Titanium will be increasing, and therefore it would be wise to have an arrangement with them and their assistance already now, as they presumably can assist considerably in the development of the uses of Titanium."

Mr. WEBSTER. I had intended to call your Honor's attention to that. I am glad Mr. Locke did.

Mr. LOCKE. I am glad to oblige, Mr. Webster.

The next paragraph:

747 "With regard to G. W."—that is Goodlass Wall
—"& Lead Ind., I do not feel so certain that they will not try to develop a production on the basis of the National Pigments Co."—the Court will remember that is LaPorte Company—"—if they do not come together with us—although they no doubt will hesitate before doing so. I believe they feel that they do not know much about production and costs of Titanium. Mr. Tasker expressed to me that they considered they should take up Titanium, but felt the situation was difficult, in view of the National Lead Company having not shown any reaction to their suggestions (or proposals)."

Then again, about the third paragraph from the end, I wish to read the paragraph which starts:

"I have the impression that Major Barley does not consider the National Pigments Co.'s patents and position to be of any interest and, on Mr. Clive Cookson's question as to Blumenfeld, he answered that they had no trade in the British Empire. He said that du Pont had a factory based on Blumenfeld and also Montecatini; du Pont, however, was not interested in the information that du Pont and National Lead Company were good friends, and

I have the idea that he may ask du Pont's point of
748 view before I.C.I. takes a standpoint. This may lead to some complications, in view of du Pont's desire to make an arrangement with you for U.S.A. and the difficulty there is in doing so, without an arrangement also on this side.—I just mention this, in case you should hear anything from du Pont."

The next paragraph:

"Major Barley expressed very definitely that a company formed with National Lead Co., I.C.I. and I.S.C. as partners, in his opinion, would leave no chances for National Pigments Co. or Blumenfeld, and you will know from my previous letters, that this seems very likely also to me."

Mr. WEBSTER. I have just one or two comments.

The COURT. First, I assume and want you to note that Mr. Whitney wants to read the last paragraph that Mr. Locke just read, too.

Mr. WHITNEY. I would like to refer to it very briefly in a moment.

Mr. WEBSTER. I thought Mr. Whitney would mention it.

I think for the purpose of understanding I should refer to the bottom of page 421, where Dr. Jebson says:

“Mr. Cookson and Mr. Tasker talked about their patents and National Pigments Co.’s patents, which
749 did not seem to interest anybody else much, except that W.S.R.”—that is Robinson I think—“seemed inclined to buy them out against a small sum, in order to get rid of a possible nucleus of competition.”

Well, the fact is, as I indicated before, that Goodlass, Wall, and Tasker did have some sort of an option or refusal of the National Pigments Company’s patents and let them go. I mean, they never did come into this or come into BTP, and it is rather interesting that instead of simply buying them out they did let them go regardless of Mr. W. S. Robinson’s suggestion about them. I think that is all I have to say about that.

Mr. WHITNEY: In reference to your Honor’s comment, here were Major Barley and Dr. Jebesen sitting together in Europe, and there is something they did know about and that they were qualified to be expert upon and that was the subject matter to which your Honor called attention—whether their proposed combination would be strong enough to keep any possible competitor out of their market. So that on that subject I think their testimony is expert.

Now there is something that they did not know anything about and that was the subject of what du Pont might or might not be thinking about over in America, and
750 the best evidence of that is that this Dr. Jebesen, who confessedly knows nothing about it, is the one that is telling Major Barley that he thinks that “you and du Pont are good friends.” Well, you see, as I mentioned before, du Pont had of course some other exchange of patent knowledge and invention with ICI. That is how we got some of the British inventions, very fortunately in this war. So that Major Barley of ICI, if anyone had thought that there was anything unusual between National Lead and du Pont, would have been the one to know it, but he didn’t even know anything about it, but received from Jebesen, who speaks exclusively through a National Lead lens of what purports to be the news. And what is the news? That we are good friends, which of course is meaningless. So that what we have is the same old story. In respect to du Pont it is only chatter, but in respect of the British market it is the most expert possible evidence.

The COURT. Very well. Plaintiff’s Exhibit 113 in evidence.

(Plaintiff's Exhibit 113 for identification received in evidence.)

Mr. LOCKE. We offer next a letter written by W. S. Robinson to Dr. Jebesen dated May 2, 1932, and call the Court's attention to the second paragraph which reads:

"In determining what might prove to be so, 751: one must bear in mind that notwithstanding our repeated advice to establish some form of works in this country, you have not done so. You are therefore today facing the certainty of competition unless an agreement is made with your most likely competitors. The latter, we are bound to say, are not likely to accept any proposal which did not give cash capital a first charge on profits."

Mr. WEBSTER. I think what is perfectly obvious about that letter is that W. S. Robinson, who was a good old-fashioned British business man, was doing some pretty heavy trading with Jebesen and saying, Now, Jebesen, you have been playing around with this and writing a lot of letters home and having a lot of correspondence with Mr. McCarty and we want to see some action; and he is putting the heat on to Mr. Jebesen.

The COURT. Also, that he has not read the Sherman Antitrust Act, particularly some of the decisions of the Supreme Court under it. I think he establishes that pretty satisfactorily.

Mr. WEBSTER. And that he is not in the least concerned with it.

The COURT. Plaintiff's Exhibit 114 received in evidence. (Plaintiff's Exhibit 114 for identification received in evidence.)

752 Mr. LOCKE. We skip the next five exhibits appearing in the printed record and take up the exhibit which appears at page 437. This letter which we offer from Jebesen to Cornish dated May 10, 1932, in which we wish to call the Court's attention—

Mr. WEBSTER. May 6, 1932.

Mr. LOCKE. May 10.

The COURT. Briefly tell us about it.

Mr. LOCKE. Well, again, just reading a line or two will cover it, if the Court please. The third from the last paragraph:

"Talking of the 50-50% or 49-51% interests, I repeated some of my previously mentioned arguments, and added that it might well be that W. S. Robinson was right in his view that the National Lead Company would not insist

apon 50%”—that paragraph, again explaining that position.

The last paragraph:

“I asked him, when leaving, whether the linking up of Titanium with Lithopone and Zinc Oxide was such that it could lead to I.C.I. considering only all three, or if they might take interest in one and not in the other. He first thought they would have to take the stones with the plums, and not only pick out the plums. This has been said in
753 connection with the question of Lithopone and Zinc Oxide. He did not know his father’s point of view as to Titanium, but anyhow they were not partners in Titanium yet.”

Mr. WHITNEY. I think your Honor must be clear on the fact, at the bottom of page 439, that reference to du Pont having a 49% interest in a factory in England in which ICI had 51% is not a factory operating within the scope of this complaint, that is, it is not a titanium factory. It is in some other industry.

Mr. WEBSTER. There are one or two things I would like to mention. The last paragraph on page 438, the middle of the paragraph says:

“Major Barley mentioned that they”—that is ICI—“for instance had been developing a new method of making linoleum; which they will give to the linoleum manufacturers and alter their industry, and they might in that connection be able to create a large outlet for Titanium, which it would take us considerably more time to open up. I agreed to his point of view there.”

Now that of course is precisely one of the major reasons why this arrangement was made with ICI, with its vast facilities for research and distribution.

Now at the top of page 439 there is this:

754 “I asked him if his remark, that the Titanium is linked up with Lithopone and Zinc Oxide, was to be understood so that if they did not agree to W.S.R.’s proposal re these last, they would not be interested in Titanium. He thought he could not answer this at present. I.C.I. was looking over various industries at present, in groups, and they considered them in groups. It may be that they would also consider Titanium separately.”

Now I think that the inference is clear from that that what I said a moment ago is true—that during this period the British business, concerns like ICI, ISC and Goodlass Wall were not, pursuant to the Government policy, acting individually but were acting more or less in groups.

755 The COURT. Do you understand that the word "groups" refers to companies or to products?

Mr. WEBSTER. I think it refers to groups of industries and I think the sense of this is, if all of it is read, that these companies were acting more or less together for the purpose of considering which of them would take up interests in these new companies.

Your Honor recalls that the ICI, and I think this is just a matter of public knowledge, was organized after the last war for that precise purpose, to bring together the theretofore divided interest of the British chemical industry, and this is in line with that.

Now I think this next paragraph is interesting also:

"Major Barley thought they could be of much assistance to us in the development. I showed some difference in accepting this view, as I considered the development of the manufacturing part would be done by the company's own organization, and the advantage to the Titanium Industry of I.C.I.'s experience generally would much depend upon the chemists I.C.I. put in, and their ability to make this experience available to us, but anyhow I felt that we were more or less of the same family."

The COURT. Exhibit 115 is in evidence.

756 (Plaintiff's Exhibit 115 received in evidence.)

Mr. LOCKE. We skip one now and take up the exhibit that is found on page 442. This is a letter from Jebson to Cornish, dated May 10, 1932.

The COURT. It is addressed to Jebson.

Mr. LOCKE. This document is a letter written by Beschorman to Jebson, dated May 14, 1932.

The COURT. Who is Beschorman?

Mr. LOCKE. He is the vice president who succeeded McCarty. McCarty became ill and subsequently died.

I wish to call the Court's attention to the second paragraph in this letter, the second and third paragraphs, and they read:

"There is one other point I think is necessary to emphasize. In your letter of April 27th to Major L. J. Barley of the Imperial Chemical Industries Limited, copy of which you also sent to the Associated Lead and to Mr. Robinson, you specify the division of the capital, on the last item, as National Lead Company or its subsidiary £125,000 for compensation for patents, trade mark and good-will. This is not strictly a true statement of what the £125,000 is being paid for. This amount is being paid

757 to the National Lead Company or its subsidiary for its established business in Great Britain, for its trade marks, good-will and technical knowledge which will be given the new company to enable them to start off without all the trouble that we have had in the past.

"We think it is absolutely essential for them to thoroughly understand that we are asking nothing for the patents. Unless this is thoroughly understood by them you will have the A.L.M. and National Pigments people, if taken in, making a demand for payments for their patent which must be avoided as our laboratory people attach no importance to these patents whatever."

The COURT. If he hadn't read the last paragraph I suppose Mr. Webster would have. He has read them both, so we are all right. Plaintiff's Exhibit 116 is received in evidence.

(Plaintiff's Exhibit 116 received in evidence.)

Mr. LOCKE. We offer next a letter from Tasker to Beschorman, dated June 10, 1932, and call the Court's attention to the third and fourth paragraphs, which read:

"You will remember that so far as National Titanium Pigments Limited were concerned, we had arranged to have an option over their position for a six months' period. We had kept them fully advised of the position,

758 and, to the best of our belief, they were completely satisfied with the line of action that was being followed, but, somewhat to our surprise, immediately on the expiry of the option period, they advised us that they had made an arrangement with Messrs. Laporte, of Luton, who are manufacturers of Blanc Fixe, for the establishment with them of a plant.

"It will not, therefore, be possible to get hold of this outfit—at any rate for the time being."

Mr. WEBSTER. No comment, your Honor.

The COURT. All right. Plaintiff's Exhibit 117 in evidence.

(Plaintiff's Exhibit 117 received in evidence.)

Mr. LOCKE. We offer next a weekend letter sent by Cornish to the National Lead representative in London, England, dated June 25, 1932.

The COURT. June 26 is in mine.

Mr. LOCKE. This is June 25.

Mr. WHITNEY. The print is wrong.

The COURT. It should be the 26th.

Mr. LOCKE. This is a long weekend letter suggesting the formation of BTP, and outlining—

The COURT. Who is Cartvan?

Mr. LOCKE. He was the National Lead representative in London as I understand. (Continuing) Giving details of the organization that would be acceptable
759 to the National Lead.

Mr. WEBSTER. I don't think that is true. I am advised that we had no such employee. I assume it is a cable name.

The COURT. That is what I would suppose. It is somebody's cable address. Whose is it, do you know?

Mr. LOCKE. I would like to explain that some place, I can't remember where, in the files, I had seen that name before and it was so used that it indicated that it was the name of a man. I may be entirely in error.

Mr. WEBSTER. I have no knowledge on that subject, but it is a cable address of some sort. One other thing that might be said about it is that it is a great long week-end letter that relates to negotiation on this subject that sets up a plan that was not approved and never became a part of the 1933 arrangement. It seems to me that it is the sort of thing that could well be omitted from the record because it is difficult to read.

Mr. LOCKE. We do not think that it has any particular significance. We were just concerned with having as full a record as we could prepare on the negotiations that led up to the arrangement.

Mr. WEBSTER. With the thought that it is sufficiently
760 important to justify its being in the record, I would like to refer to page 448 where Mr. Cornish, who was formerly president of National Lead Company, says:

"Regarding the payment of £125,000 to us for our good will, etc., I can only say that our technical knowledge has been very costly resulting in our having over six million dollars invested in the manufacture of titanium pigments involving losses of over two million dollars before they began to pay. I am informed that two of the best reputed accountants of Great Britain (one suggested by you) have placed £125,000 as the fair value of the business that we have been doing in Great Britain."

The COURT. Exhibit 118 received in evidence.

(Plaintiff's Exhibit 118 received in evidence.)

Mr. WHITNEY. May I just point out, your Honor, that on page 447, in the middle, beginning about the eighth line, your Honor will find that the economic situation was that

the German costs of production were so low that it was unwise to conduct a plant in Britain unless the protective policy of England cut the German manufacturer out so as to make the plant worth while. Those were the sort of economic considerations that were operating.

Mr. LOCKE. We offer next a letter from W. S. Robinson, to Edward Cornish, dated July 16, 1932, and 761 in this letter we wish to call the Court's attention to the last paragraph, which reads:

"The Imperial Chemical Industries state that it is very desirable to eliminate competition in the relatively small British market, and subject to your concurrence, they will do this by offering a small participation to the Blumenthal people, who are desirous of entering the business."

There is a copy attached to the exhibit that we are offering. We are offering just one of those documents.

Mr. WEBSTER. I just point out that here is a letter from W. S. Robinson, President of a British company, Imperial Smelting, to Mr. Cornish, telling him what Imperial Chemicals told him about what conditions are in England and what is desired there.

The Court. Exhibit 119 is in evidence.
(Plaintiff's Exhibit 119 received in evidence.)

Mr. LOCKE. We offer next a letter from Cornish to Robinson dated July 20, 1932. We offer this merely for the purpose that it includes a statement in there that the Canadian situation should not be considered in the negotiations for the development of BTP, because the Americans have the exclusive right to the Canadian market.

Mr. WEBSTER. Do you offer the telegram attached to that?

762 Mr. LOCKE. Not as part of that exhibit. We are not going to offer that telegram, no.

Mr. WEBSTER. This reference to Canada may be of some importance:

"Inasmuch as our sales department is thoroughly organized in Canada and negotiations have been pending with other Canadian interests to manufacture in Canada, and we have \$550,000 par value of Canadian gold bonds with which to build the plant (if necessary) in Canada, I think probably this feature will adjust itself by letting our Canadian company, instead of building a plant, buy from the American company or the new plant to be constructed in England, whichever may prove to be more advantageous to it" etc. Of course, what actually happened throughout the war and prior to the war is that we have supplied

very large quantities of titanium required in Canada and the plant has not been built.

The COURT. All right. Exhibit 120 received.
(Plaintiff's Exhibit 120 received in evidence.)

Mr. LOCKE. I offer next a letter from McCarty to Robinson, dated August 12, 1932, with a memorandum attached, and the memorandum is dated August 12, 1932.

Mr. WEBSTER. I don't think it appears that McCarty wrote it.

763 Mr. LOCKE. There isn't anything to indicate that, except the use of the word "Vice-president" at the bottom, and we assume that it was McCarty because he signed his name over "Vice-president."

We are now advised by the attorneys for National Lead that on their copy the name Beschorman appears, so we will accept as the author of that Mr. Beschorman.

Mr. WEBSTER. The name Beschorman does appear, but it does not appear to be Mr. Beschorman's signature. Nevertheless we do not contest it.

Mr. LOCKE. We offer this for the information contained on the memorandum. It is a memorandum which describes the Blumenfeld position as it existed at that time.

Mr. WEBSTER. Your Honor, I have no objection, but at the top of the second page it ought to be "memorandum for Mr. W. S. Robinson."

The COURT. Instead of "J.S." Exhibit 121 is in evidence.

(Plaintiff's Exhibit 121 received in evidence.)

Mr. LOCKE. We skip the next two documents that appear in the printed record and now offer a letter written by H. T. Warshaw, to E. J. Cornish, President, dated November 10, 1932.

Mr. WHITNEY. That has not yet been furnished
764 the printer.

Mr. GESELLS. There is a note about it on 461.

Mr. LOCKE. We are offering it and calling the Court's attention to the second paragraph, the last part of the second paragraph.

Mr. WEBSTER. No objection.

The COURT. Exhibit 122 will be received.

(Plaintiff's Exhibit 122 received in evidence.)

Mr. LOCKE. If the Court please, that concludes the development of the organization of the European companies up to and including 1933. Mr. Dixon will now develop the picture in America.

Mr. DIXON. May it please the Court, before I start to go into this phase of the proof, I am wondering, and I am now directing my remarks to counsel for National Lead, whether you have been able to as yet locate or have with you No. 354 on your subpoena which is in our order of proof. We do not have it in our file.

I might also say, while they are checking that, that you will find in the printed material a letter dated October 19, 1927, to which are attached two other letters dated April 28th and August 12th. Those appear to be out of order. Twenty-one pages down, I am informed, your Honor.

The COURT. Is this in the newly printed 764a matter?

Mr. DIXON. That is right. It consists of six printed pages and is the first document which we expect to offer, and that is the only one that apparently is out of order.

765 Mr. WEBSTER. This is October 19, 1927?

Mr. DIXON. That is correct.

The COURT. Signed by Jebson and addressed to McCarty?

Mr. DIXON. That is right, your Honor, to which are attached two other letters dated April 28th and August 12, 1927.

The COURT. Is that what you are now offering?

Mr. DIXON. That is what we are discussing. I have not yet offered it, but will in a moment.

Mr. REA. I find that we were unable to find the document called for in response to No. 354 of the subpoena.

Mr. DIXON. Let the record show that the document requested purports to be a letter dated December 22, 1927, Andrew Thompson to McCarty containing a complete report relative to the patents of Titan Company and Titanium Pigment Company, which will be referred to in one of the subsequent exhibits. It was called for merely so that, if available, the entire file in connection with the subsequent patent investigation might be available.

Mr. WEBSTER. Has the Government got a copy of this letter which we have been unable to find?

Mr. DIXON. We do not have, your Honor, and that is the reason we called for it.

766 The COURT. I understand from counsel that it is mentioned in another connection and that is his knowledge of it, and limited to that.

Mr. DIXON. That is right.

We now offer in evidence as Plaintiff's Exhibit 123 a

letter dated October 19th, which should now be at the head of the printed exhibits, with, of course, the two enclosures referred to in this letter, namely, one dated April 28th and the other August 12th, 1927.

Mr. WEBSTER. That is all offered as one exhibit?

Mr. DIXON. That is right.

Mr. WEBSTER. I think your Honor will find it interesting to look at this correspondence, particularly the code letter dated August 12, 1927. In the first place this appears to be a re-written letter addressed to somebody at I. G. Farber by somebody who calls himself "R" concerned apparently with a lot of gossip and rumor and hearsay that "R" is communicating to someone in IG, and it just has a lot of speculation and comment in it that has no materiality whatever, and I think is prejudicial as being confusing. I submit it ought to be kept out. It is incompetent as hearsay, several times removed.

The COURT. I will have to look at it. That goes through two letters?

Mr. DIXON. That is right. I don't know as your
767 Honor cares to have me discuss the exhibit or tell you what is in it, but if you care to I will be glad to do it now.

The COURT. If you want to do it briefly it will save me the trouble of reading it.

Mr. DIXON. This letter from Dr. Jebesen to Mr. McCarty dated just after the completion of the German contracts and the execution of those contracts shows the door which was opened and the method whereby information apparently circulated among those who were in the titanium pigment business.

The COURT. What was that door?

Mr. DIXON. That, in this particular instance, your Honor, the IG Company with whom a deal had already been made with the National Lead Company in Europe was receiving information concerning the American venture in the titanium pigments which was, as we shall show, in competition—that it was just commencing—with the project referred to here, namely, the creation of the Commercial Pigment Company, was immediately transmitted to IG for the purposes of endeavoring, if possible, to make a deal, and it was suggested in the August 12th letter to IG that this new company in the United States was expected to be in definite competition with the National Lead Company, and that National Lead might

perhaps, or even should, attempt to make a deal
768 with this new company. Now this information then
immediately is transcribed via IG to Jebesen, who,
in turn, sends it back to McCarty in New York; so the
circle is complete for that purpose.

Now we want to show the early date of commencing of
the cooperation which ultimately led to the making of the
deals and the combinations that are referred to in the
complaint, and to show how they started and how they got
under way, and this is one of the early exhibits, and I
might say, your Honor, to show you how correct they were
the subsequent evidence will show that all of the things
referred to in these unsigned letters were in fact true.

Mr. WHITNEY. May I ask Mr. Dixon if in all this welter
of words he is to be understood as referring to du Pont?

The Court. We will suspend on that question.

Mr. WHITNEY. Well, your Honor, if I could get that I
could do some useful work. He has talked of the com-
binations and deals and cooperation that are going to
merge in answer to your Honor's question as to "What
is it about?" I am asking the short question, "Is he re-
ferring to du Pont at this particular time," in all fair-
ness to counsel for the defendant and to the party du

Pont, for apparently in 1927 they had no connection
769 with this enterprise in the United States. You
said "leading up to all these deals or agreements."

Is du Pont one of those suggested parties to whom that is
leading up?

The Court. We will suspend on that note.

Mr. WHITNEY. You see, your Honor asked him with a
view of aiding in all this quite ununderstandable and un-
intelligible comment, to take out of the National Lead
Company's files a passage with initials, and he says in
answer to your Honor's question that this refers to some
future deals and agreements, and I would like him to say
yes or no whether I am to study this exhibit; whether it
refers to a du Pont deal?

The Court. I take it his answer is no.

Mr. Dixon. No.

(Recess to 2.15 p.m.)

770

AFTERNOON SESSION

The Court. Have you any objection, Mr.
Webster?

Mr. WEBSTER. Yes, your Honor.

The Court. This is not admissible as proof of the

contents of this communication, but if it is intended to prove the kind of gossip that Mr. McCarty heard, if that is material, why I will receive it for that limited purpose.

Mr. DIXON. That is all it is offered for, your Honor.

Mr. WEBSTER. That is just about what I was going to say. I think that what Mr. Dixon said before indicated he seemed to attach a kind of mystery to this letter apart from that, and I believe the next letter he has in his list explains the whole affair and shows there was no mystery to it.

The COURT. Very well, Plaintiff's Exhibit 123 will be received.

(Marked Plaintiff's Exhibit 123 in evidence.)

Mr. DIXON. We offer Plaintiff's Exhibit 124 in evidence, which is a letter from McCarty to Jebesen, dated November 4, 1927. This is the reply to the previous letter, your Honor.

The COURT. Is there any objection?

Mr. WEBSTER. No objection.

771 The COURT. It will be received.

(Marked Plaintiff's Exhibit 124.)

Mr. DIXON. I just want to point out that in this letter Mr. McCarty, whose name will appear considerably from now on in these negotiations, and whose position with Titanium Pigment Company has been previously shown in evidence as an officer and director of that company, reference is made to the new factory of Commercial Pigments in the United States and that McCarty had asked Chase, who was the head of the new company, whether Commercial Pigments was prepared for patent litigation and had been advised by Chase that they were, and that this report led to the comment from McCarty to Jebesen that this new enterprise is apparently a serious undertaking and brings us "face to face with a problem that will have to be dealt with as soon as the production of the company is on the market," and that if the information given to McCarty by Chase concerning the European situation is correct, that Jebesen will have the European Blumenfeld group to deal with in Europe in the following year or immediate future.

Mr. WEBSTER. If I wanted to be rude I think I might say, "So what?"

But passing from the references that Mr. Dixon made there are two or three things I would like to refer
772 to. In the first place he explains completely the previous document from the mysterious Mr. "R" to the IG. Then on page 477 he says:

"I was further informed by Mr. Chase that his company had made a contract with Travancore Minerals, Ltd., for their supply of ilmenite. This statement has been confirmed by information given to us through European representatives of American railroads. We have reason to think that the Commercial Pigments Co., tried to obtain some ilmenite deposits in Virginia, which the Titanium Pigment Co., acquired during the spring."

Now I mention that simply to show that so far as Travancore is concerned, Mr. Chase had no difficulty in getting all the ilmenite he seemed to want; that there was no problem there.

Now another interesting observation, in connection with the last page of the letter, page 478, namely:

"I cannot quite make up my mind whether Mr. Chase's object in telling me all this was to let me have first-hand instead of hearsay information, or whether he was building up a background for a proposal to sell the plant to us a little later on."

Now there you will see Mr. Chase was apparently giving Mr. McCarty an opportunity to buy out this new
773 site, and I may say that Mr. McCarty did not take advantage of that opportunity.

Mr. WHITNEY. It seems to me, your Honor, that the important paragraph in this letter, from Mr. Dixon's point of view, is the one of which he read the first two sentences, to wit, the paragraph at the bottom of page 477. The sentence he read or paraphrased is as follows:

"I asked Mr. Chase if his company were prepared for patent litigation, and he told me that their counsel had assured them that they were secure on that point. Mr. Chase went on to say, however, that he personally had no connection with the patents having been engaged simply as an engineer."

I take it Mr. Dixon's purpose is to establish by this kind of evidence that Commercial Pigments Company was not afraid of National Lead patents. If so the evidence is valueless as it would appear if Mr. Dixon had read the second paragraph:

"That he personally had no connection with the patents having been engaged simply as an engineer."

Now these National Lead patents were numerous, potent and menacing and the weakness of the Government's suggestion to the contrary is given emphasis by their use of such rubbish evidence as this to support it.

774 The COURT. Strong language.

Mr. WHITNEY. Well, I modulated it for my previous thoughts. Incidentally, who is Mr. Chase? There is nothing in the evidence about him that I have seen.

The COURT. There has been some talk about his being connected with Commercial Pigments; the company of the team of Chase and Ticknor.

Mr. DIXON. I think that is as good a description as any of Mr. Chase, although I have asked defendant National Lead to get up a list of all the connections and so on of any of the persons named and we are still waiting for that, and a complete list from du Pont before we introduce both of them. Suffice to say at this time that Mr. Chase, from our understanding of the documents, was a close associate of Mr. Ticknor who was president of Commercial Solvents Company and president of Commercial Pigments Company, and I believe Mr. Chase was also an officer in Commercial Pigments Company.

Mr. WEBSTER. If the Court please, we not only gave Mr. Dixon the names he requested, but we amended the list at his request, notwithstanding the terms of the subpoena, and he has offered it in evidence as Government's Exhibit 50. That is the complete and final list. Now Mr. Chase is not and has never been connected with the National Lead Company. He was not named on this list.

775 Mr. DIXON. I have not said he was.

The COURT. All right.

(Marked Plaintiff's Exhibit 124.)

Mr. DIXON. We offer Plaintiff's Exhibit 125 in evidence, the same being a letter from Jebson to Mr. McCarty, dated November 25, 1927, page 479 of the printed exhibits. These exhibits should or will follow right along.

The COURT. Is there any objection? There being none Exhibit 125 is received in evidence.

(Marked Plaintiff's Exhibit 125.)

Mr. DIXON. The only thing I wish to point out in this letter is that McCarty is advised that the Blumenfeld competition seems to be increasing and that Montecatini is producing for export.

Mr. WHITNEY. That is not in the evidence. Maybe Montecatini is, we do not know, but this is no evidence of it whatsoever. It is only revealing of how this case is made up.

776 Mr. DIXON. We will connect this all up, your Honor.

Mr. WHITNEY. Well, get going, please.

The COURT. This letter says it is a report from Mr. Jebson to Mr. McCarty in which he tells him he understands the Blumenfeld competition is increasing. As I said before, this goes to show that Mr. McCarty had a report which told him that the Blumenfeld competition was increasing. Whether in fact it was I do not know, and whether in fact Mr. McCarty believed Mr. Jebson when he told him so I do not know. He may have simultaneously received a report from another agency telling him the Blumenfeld competition was decreasing, but we have the information at least that Jebson told McCarty the Blumenfeld competition was increasing, and it proves no more than that; and if anybody cites me this letter as a proposed finding for more than that he is going to find himself on the wrong side of the finding. Go ahead. Is there any other comment?

Mr. WEBSTER. No comment.

The COURT. The next exhibit.

Mr. DIXON. We offer in evidence Plaintiff's Exhibit 126, the same being a letter from McCarty to Jebson dated December 14, 1927—page 481.

Mr. WEBSTER. No objection.

777 **The COURT.** It will be received.

(Marked Plaintiff's Exhibit 126.)

Mr. DIXON. The only point in offering this, your Honor, is to indicate that McCarty advises Jebson of the American situation and that they expect competition of an active nature from this new company in the immediate future.

The COURT. Is there any other comment? There being none, the next exhibit.

Mr. DIXON. We offer Plaintiff's Exhibit 127 in evidence, the same being letter from Mr. Peck to Mr. Meredith, the president of Titanium Pigment Company, dated December 19, 1927.

The COURT. Is there any objection?

Mr. WEBSTER. Your Honor, owing to the Government now having skipped a good many exhibits, they have gotten ahead of my home work and I will have to take a moment to look at this again.

The COURT. All right.

Mr. WEBSTER. Now, your Honor, I am not going to take time now, or take your Honor's time, to read and analyze this letter with extreme care, but I base my objection upon a statement made at the conclusion of the letter by this lawyer, Philip C. Peck, which I think epitomizes other
778 things that might be said. Does your Honor care to have me read it?

The COURT. Is that the part marked "Conclusions"?

Mr. WEBSTER. "Conclusions." Page 493.

The COURT. Just let me read it. (After reading) What were you going to say?

Mr. WEBSTER. One other reference of the same sort on page 482:

"The only information as to what comprises the Blumenfeld procedure in the manufacture of the sample product is obtained from recent letters of Mr. Jebesen as to what a Dr. Raspe told him regarding the operation used at the Montecatini plant in Italy, such information coming from a man of the 'I.G.' who had visited this plant. Hence the vagueness and uncertainty as to what detailed procedure was actually employed, and the hearsay character of the proof is manifest."

The COURT. Well, your objection is well taken if this is offered to prove infringement by Commercial or non-infringement by Commercial of the National's or Titan's or TP's patents, but I do not understand that it is offered for that purpose.

Mr. DIXON. It is not.

The COURT. I understand it is offered and can be received only for the purpose of showing that Titanium
779 Pigment was at the time concerned with Commercial Pigment's competition and was investigating whether it could defend itself by way of patent monopoly against this competition looming up in the immediate future. Beyond that I do not know what else there is in this exhibit which throws any light on the case. If there is Mr. Dixon will tell me.

Mr. DIXON. There is none, your Honor. It is offered for the precise purpose you have stated.

The COURT. For that limited purpose have you any objection?

Mr. WEBSTER. No. It just shows that he consulted patent counsel.

The COURT. That is right, with a view to ascertaining what their probable relationship with this new competitor was going to be.

Mr. WEBSTER. I think that could be proved, however, without putting 15 pages of material in evidence.

Mr. DIXON. We do not ask that anybody read all of that report unless you care to. We are offering it only to show that they consulted patent counsel at that time, and your Honor can determine from the subsequent evidence what, if anything, was done from there on.

The COURT. For the limited purpose—

Mr. WHITNEY. On Mr. Dixon's statement and your
780 Honor's ruling I take it it is abundantly clear this falls within the class of exhibits that cannot be admitted against du Pont on any theory. If later du Pont be connected with this conspiracy this is not, on any theory, a paper in furtherance of the conspiracy or, call it the enterprise. This comes from an outside independent lawyer advising an alleged conspirator, one of A, B or C, as to the patent lawyer's independent opinion as to certain then existing patents, and therefore I object to it on any ground; not subject to connection; on any ground against du Pont.

Mr. WEBSTER. May I add a word to that. I would like also to impress upon your Honor the question of materiality. What possible bearing can it have on the issues in this case, even on the theory, as now limited by the concession of Mr. Dixon, that Mr. McCarty should ask competent counsel to give him an opinion as to certain American patents in a field in which Mr. McCarty was interested? It seems to me that it has no weight at all on the issues before your Honor.

The COURT. Let me see if I can deal with the two situations in order:

First, as to Mr. Whitney's objection. If it should appear that A, B and C, to wit, National Lead, Titan, and so
781 forth, conspired, and if this document helps prove that conspiracy on the two hypotheses then of course the conspiracy, once having been established, if it should then appear that Mr. du Pont appeared on the scene tentatively and said, "Gentlemen, I am one of you hereafter," and obtained knowledge of the character and scope of the conspiracy, in that sense this document is admissible against du Pont as well as against everybody else. I know it is a very remote sense.

Mr. WHITNEY. With no sense at all, with great respect.

The COURT. When that situation develops this letter would not make any difference so far as du Pont is concerned. That is the way I see some of the rulings as this case develops. I will say after you have established the conspiracy, and after you have established, aliunde that the new one has joined the conspiracy, then the evidence of prior acts, and so forth are admissible against that additional conspirator. Of course by that time you do not need it, because you have everything else you need in the case to establish that situation as far as the new

joiner is concerned, but in that remote sense this document, I suppose, could be admitted subject to connection.

Now as to Mr. Webster's objection—

Mr. WHITNEY. Can I be heard on that later, your Honor?

The COURT. Yes. I will give you an opportunity.

782 I can conceive of a situation in which it may become important to prove that in December of 1927 TP was concerned with the completeness of its patent production in the light of an actual or possible challenge or whether it could use its patents as an efficient offensive weapon in the light of a prospective competition. Now you might say, how can that be material? Well, it would indicate, or might indicate that they were there and joined the market, a prospective competitor rises up, they become alarmed, and their first recourse, of course, is to see whether they can stop it by patent control. I suppose that the Government may ask me to infer that having failed to accomplish it by way of patent protection they seek other methods, to wit, conspiratorial arrangement in violation of the Antitrust Act and this document may therefore be a sand in the scales and indicates that they had first explored the patent situation before they had recourse to the business transaction and to indicate that the business transaction had as its object the same object which was to be expected from exertion of the patent powers, to wit, restraining of the competition.

Mr. WEBSTER. If your Honor please, if I may address myself to that right now, before you get into this somewhat more intellectual question that Mr. Whitney will argue, what is the inference to be drawn from the

783 fact that a patent holder asks its counsel for advice as to their patents. Now I assume that every patent holder of any importance asks questions of that sort every day and patent lawyers give that kind of answers every day, and the right of the patentee being a right to exclude he is concerned to get answers to those questions. Now it seems to me that this is peculiarly a case where, even if your Honor thought it be a sand in the scales against the National Lead Company, even that weight could not be attached to it if it is taken, that a transaction of that sort between patent counsel and patentees is wholly consistent with innocence.

The COURT. Yes.

Mr. WEBSTER. Certainly, your Honor, even in this situation will take that view of the evidence where the evidence

has so little weight, or if consistent with innocence, where all of the patents practice and the rights of patentees support precisely what was done here.

The COURT. Well, I am not now deciding questions of weight, of course. I am deciding questions of relevance. It seems to me that it is possible that the inference may be drawn, provided the other facts are established in the context, that National Lead or Titan Product said, "I want to stop competition of Commercial Pigments, of the newcomer on the field." You may not go into it.

784 Well, supposing there were two letters, one letter addressed to patent counsel saying, "Will you examine the patent front?" And another letter, addressed to Mr. Webster, saying, "Will you examine the antitrust front?" You can see how such letters might be admissible, except that they might be privileged, but no such argument as that is addressed to me here, but it might throw light on the question whether the intention was to protect the patents or whether the intention was to stop competition, patent or no patent, legal or illegal, and if not legally, then illegally. I think it is admissible and relevant.

Mr. WHITNEY. Your Honor, the point to which I was going to address myself, which I hope is as much a practical as an intellectual point—

The COURT. I do not concede the inconsistency.

Mr. WHITNEY. Nor do I.

Mr. WEBSTER. Nor did I imply it. I am referring to the discussion between your Honor and Mr. Whitney.

The COURT. Thank you.

Mr. WHITNEY. We will try to get it down to the level that we can all understand. That is this, your Honor: I understand, and submit to your Honor that the rule is that any act or declaration done or said by a co-conspirator in furtherance of the object of the enterprise, denominated the conspiracy, becomes evidence against any

785 party who joins the conspiracy, because the problem of the Government is to define and delimit the conspiracy that they are charging, and, secondly, to identify those who joined it, by analogy to a partnership from the law of which is taken the law of conspiracy, but that acts or declarations not in furtherance of the enterprise are not evidence against parties other than the actors or declarants, no matter when made. It is not a question of time. It is equally true, whether it be true during the conspiracy or before it or after it. Those are admissible only as admissions against the party declaring, or if under

some other rule of evidence, against the party acting or declaring.

Now your Honor has admitted this afternoon Exhibits 123 through 126, in each case expressly ruling that you were refusing to admit it upon the basis for which Mr. Dixon first offered it, but were admitting it, and only admitting it, as evidence of the fact that Mr. McCarty on behalf of National Lead at the time in question had had brought to his attention, and therefore had within his knowledge, what was stated in the letters. What your Honor said as to the first letter, and what Mr. Dixon repeated in the phrase "kind of gossip." Now I did not raise this point on Exhibits 123 through 126 because of decent regard for the exigencies of time. I shudder at this case otherwise as it has developed and is developing.

786 The good intentions are gone and we have every single document in order and we have not done 10% of the documents the subpoena discloses, so in the interests of time I have not by any means talked whenever I should.

Now on Exhibit 127 I want to raise the point that was equally applicable to all the others, that the question of what was known to Mr. McCarty or any other officer of National Lead, what they thought, what was told them, is not a question with which an even assumed subsequent, or even then existing, conspirator could be concerned. Mr. Peck is not charged with having been a conspirator, nor is it charged in the complaint nor in Mr. Dixon's statement about this document, that Mr. Peck was making these statements in furtherance of the objects of the conspiracy. He only claims that he wants these statements in to show what Mr. McCarty then knew, and on that basis I submit to your Honor under the cases that do not admit of discussion or dispute it is not admissible against du Pont on any ground anywhere.

787 The COURT. I don't quite see it your way. Let me think it through a moment and see whether I can put it down in words. If you mean that it does not prove that du Pont joined the conspiracy, of course you are right and it is not admissible as against du Pont on that issue. I think perhaps we get lost sometimes because the language of these cases is general when it says "admissible" and "inadmissible" without specifying with respect to what issue it is admissible. Now, clearly, this is not admissible to show that du Pont joined the conspiracy. But as I read some of the cases, it strikes me as follows: that this is of course admissible as showing

what Mr. McCarty had in his mind, assuming that that is a relevant issue in this case, and helps to establish what the cases call the origin and history of the conspiracy, or perhaps what the Government sometimes calls under its caption "background." I don't know, but, anyway, certainly origin and history.

Now, once the conspiracy between A, B and C is established by evidence including proposed Exhibit 127 and then once it is independently established that du Pont joined the conspiracy, then I take it that all the evidence which established the conspiracy becomes available as against du Pont.

788 Mr. WHITNEY. Your Honor was kind enough to give me my exception in advance. I don't think I ought to waste more time. I disagree with that viewpoint. I think it is error.

The COURT. You think it is wrong.

Mr. WHITNEY. And I except, with great respect.

The COURT. Well, I should like to demand your time just a little bit longer for you to indicate to me wherein that error lies because—

Mr. WHITNEY. It lies in saying that any evidence that goes to establish the presence of the conspiracy of A is admissible against B, whereas, as I understand the cases, and as I reread some last night, they say that only that evidence which is in itself in furtherance of the conspiracy is admissible against others than the actors or narrators.

The COURT. You are now talking about the law relating to declarations.

Mr. WHITNEY. There is nothing here to—

The COURT. Of course you are now dealing with admissions and declarations need not necessarily be admissions, or an admission may be independently received.

Mr. WHITNEY. The cases say acts or declarations. By declarations they include no doubt admissions which are a form of declarations. Acts or words.

789 The COURT. I understand. I used the word "presence" but I did not mean to use the word "presence" because that gives me a different angle altogether. I mean conduct of the conspirators, including their mental conduct of the conspiracy, it having been established that A, B and C conspired and did certain things in furtherance of their conspiracy; then, if it independently is established that D joined the conspiracy, I am under the impression at this moment that the conduct of A, B and C becomes admissible as against the new—

comer, D, provided it is independently established that D joined the conspiracy.

Mr. WHITNEY. The conduct of A, B and C in furtherance of the conspiracy, your Honor.

The COURT. Yes.

Mr. WHITNEY. But only the conduct of A, B and C in furtherance of the conspiracy. That was the subject matter of yesterday morning and it is again the subject matter now. My objection is grounded upon the proposition that this letter is not in furtherance of the conspiracy.

The COURT. That is not the question before us. The question is whether the acquisition of this information by Mr. Meredith or National Lead is in furtherance of the conspiracy, not the letter. But the acquisition of the information transmitted in the letter—whether that
790 was an act in furtherance of the conspiracy. And to me, on that issue—

Mr. WHITNEY. Your Honor, that is not an act, Mr. McCarty hasn't either acted or spoken.

The COURT. Yes. He learned.

Mr. WHITNEY. But that is not an act. The fact that Mr. McCarthy knew—your Honor is suggesting that every piece of knowledge that is within the mind of every partner is evidence against another partner; that if I have a guilty thought and express it in my sleep, although I never do anything about it, that Mr. Swaine can be indicted for it. I don't think your Honor is right.

The COURT. No, I don't go quite that far at all.

Mr. WHITNEY. All your Honor has admitted this exhibit for is to show that something got into the mind of Mr. McCarty.

The COURT. And National Lead.

Mr. WHITNEY. And National Lead.

The COURT. In the mind of National Lead.

Mr. WHITNEY. That is right. In the mind of Mr. McCarty on behalf of National Lead.

The COURT. Or whoever it is. National Lead received the report. I think that is an act, like any other act
791 —like sending a report. I think receiving a report is just as much an act like sending a report.

Mr. WHITNEY. That depends upon whether the report itself is in furtherance of the conspiracy. Receiving a report other than a report in furtherance of the conspiracy is not in itself an act in furtherance of the conspiracy.

The COURT. That is true. Well, if investigation of the

patent situation is a necessary step in furtherance of the conspiracy, then the receipt of a report on the patent situation is an act in furtherance of the conspiracy.

Mr. WHITNEY. Well, your Honor, anybody as keen as your Honor can find a form of words, like counsel, to express any viewpoint, and it is only with great respect that I think you have expressed an erroneous one.

The COURT. I am not finding fault.

Mr. WHITNEY. I almost prefer that your Honor rule against me because it saves me a delightful exception. I think I have pressed your Honor as far as I can. The subject, among other places, is well discussed in *Hitchman v. Coal & Coke*, 145 United States—I have forgotten the pages—it is a page and a half.

The COURT. I know the case.

Mr. WHITNEY. It is discussed in many places and your Honor will find always the phrase “in furtherance of the conspiracy,” a phrase that is always included when speaking of—

The COURT. More completely, “in furtherance of the objects of the conspiracy.”

Mr. WHITNEY. In furtherance of the objects of the conspiracy. Your Honor is quite right.

Now, for Mr. Peck to say, in my opinion the patents of the other party do or do not infringe, is not in itself in furtherance of the object of the conspiracy. Maybe later Mr. McCarty and Mr. Meredith may themselves say something or do something in furtherance of the objects of the conspiracy based on that knowledge, but Mr. Peck's report isn't in furtherance of the objects of the conspiracy, it is my submission to your Honor.

The COURT. Very well. The thing is still cooking in my mind. Maybe it will boil down before we are through.

Exhibit 127 in evidence.

(Plaintiff's Exhibit 127 received in evidence.)

The COURT. I suppose I have to a certain extent usurped the functions of Government counsel in meeting these objections. I should really give you an opportunity to state the Government's position in this matter, but we have discussed these matters so many times—

Mr. WEBSTER. Your Honor's position is more important to us than Mr. Dixon's.

Mr. DIXON. I am sure I would much rather listen to you, your Honor.

The COURT. I know I should have the benefit of it. Very well.

Mr. DIXON. Your Honor will recall that a few moments ago we called for a certain document from National Lead, dated December 22, 1927, which was the report by Andrew Thompson of Titanium Pigment Company to Mr. McCarty, which concerned the general patent situation. The only reason I refer to it now is in part the reason your Honor has already given, which is the Government's purpose in offering this evidence, and that this letter of December 22, 1927 which we do not have was referred to in February of 1932 when the defendants or co-conspirators, Titanium Pigment Company, were again going into the patent situation.

Mr. WEBSTER. We haven't got it.

Mr. DIXON. I am just explaining to your Honor the reason why we called for that exhibit.

The COURT. Very well. We haven't got the exhibit, nobody can read it, and I am not going to even try to speculate as to what it contains.

Mr. DIXON. We offer in evidence Plaintiff's Exhibit 128, being a letter from Mr. Barton to McCarty, 794 dated January 17, 1928, on page 494.

The COURT. Is there any objection?

Mr. WHITNEY. I don't have to mention again the second type of objection, do I? I have one objection—

The COURT. You mean to which you have a continuing objection.

Mr. WHITNEY. The one that it was connected, that was the continuing objection. And the objection that this being a declaration to the conspiracy and in my view not in furtherance of the conspiracy, I object to it on that ground. I do not see anything to be gained either by your Honor or anyone else by repetition of it.

The COURT. You are quite right.

Mr. WEBSTER. Your Honor, this letter appears to be even more remote, to be an even smaller grain of sand, for the reason that on its face, so far as I can tell, it relates to a patent called the O'Brien patent, that Mr. Barton, who was the author of this letter, referred to as the Glidden patent. I do not recall anything being alleged in the complaint or stated in Mr. Dixon's opening, or brought out by any of the other correspondence in the case, that justifies us in construing an action by Mr. Barton in analyzing an O'Brien patent as an act in furtherance of any conspiracy.

795 The COURT. Who was Barton at that time? I

know who he was originally, he was one of the inventors, but who was he then?

Mr. WEBSTER. He is still an inventor.

The COURT. Is he an officer of the company?

Mr. WEBSTER. He was the director of research of the Titanium Pigment Company. Now it would certainly fall within his sphere to take a look at other people's patents if they had any relation to this field of manufacture at all.

The COURT. Mr. Dixon, what do you say about that? I haven't read the letter.

Mr. DIXON. Your Honor, this refers briefly to one of the patents which subsequently will come into discussion here, the Rossi-Schroeder patent of National Lead Company. That is on page 495. You will find that reference there. We merely put it in at this time for that purpose.

Mr. WEBSTER. I would like to ask Mr. Dixon a question: If it is claimed that an inquiry by Mr. Barton into the claims of a patent that appear to have some connection with the Rossi and Schroeder patents of the Titanium Pigment Company is within the issues of the case and material to them?

Mr. DIXON. Well, we think that what the parties thought and the information that they had available from their various experts, whether they be chief chemists, inventors, or patent counsel, upon which they may have or may not have made a decision to do certain things is competent evidence that the Court should have in considering and in passing upon the question of what the intention of the parties was at the time they entered into the agreement.

Mr. WEBSTER. He says, "It would seem that this patent would be invalid."

The COURT. He thinks the O'Brien patent is.

Mr. WEBSTER. Yes. Based upon the rules of the Patent Office, and speculates about it.

The COURT. Yes. And he also says that even if they are valid he thinks they would infringe upon—

Mr. WEBSTER. Rossi and Schroeder.

The COURT. —this patent owned by the National Lead.

Mr. WEBSTER. And Titanium Pigment Company.

The COURT. It is a little remote. I can't see just exactly how it will become material now, but I will receive it on credit.

(Plaintiff's Exhibit 128 for identification received in evidence.)

Mr. DIXON. I wish to offer Plaintiff's Exhibit 129 in

evidence, being on page 496, and being a letter
797 of Mr. McCarty to Jebson dated April 13, 1928.

Mr. WEBSTER. Your Honor, I really regret taking up time but I think if your Honor reads this letter you will see all of the objections I might see and perhaps more, and probably state them more effectively.

Mr. WHITNEY. I would like to ask one thing, your Honor, and that is if Mr. Dixon would be so kind as to tell us what conspiracy this page is furthering. I will perhaps be able to discern some time whether we will get into it.

The COURT. Well, you are at liberty to answer.

Mr. DIXON. Thank you, your Honor. This exhibit shows that Mr. Ticknor, the president of Commercial Solvents Corporation, has just left for Europe.

The COURT. No, it doesn't show anything of the kind. I read the line but it doesn't say that, as I construe this exhibit. I certainly won't receive them for that sort of thing. It says that Mr.—

Mr. DIXON. I am sorry, your Honor. He has been informed of that and is therefore advising Dr. Jebson.

The COURT. He thinks Ticknor is going there. For all I know, he is taking somebody down to the Riviera.

Mr. DIXON. In other words, it is advice from McCarty to Dr. Jebson in Europe to keep his eyes and ears open
798 for any developments or anything that Mr. Ticknor of Commercial Solvents may be up to, if anything, in Europe in the titanium pigment field.

Mr. WHITNEY. That is completely unresponsive to the question, your Honor. The question is, what conspiracy is this document in furtherance of? Now, that is critical. We have here a complaint of a conspiracy. No document is admissible except relevant to the complaint. The question for us to meet under the complaint is whether we joined the conspiracy, the enterprise defined in the complaint. And I want to ask what is the conspiracy to which this document is supposed to be connected? Mr. Dixon didn't answer it at all, did not even attempt to.

Mr. DIXON. I am trying to make my remarks brief, your Honor, because the same question will come up from time to time.

Mr. WHITNEY. I am asking that he particularize the conspiracy at this time. If I had made a motion before answering to ask him to particularize the conspiracy in accordance with the modern equity rule it would probably have been denied upon the basis that that was not the

appropriate time. And I am now asking Mr. Dixon to particularize the conspiracy—what is it—using this exhibit as his text.

Mr. WEBSTER. And after he answers that question—
799 Mr. WHITNEY. Let us see if he does answer it.

Let us take one at a time. It is a very critical question.

The COURT. I suppose the practice of counsel is to ask the Judge the question.

Mr. WHITNEY. I will make it formal. I am making a motion to your Honor that, having regard to the utter remoteness of this paper to anything that either your Honor or we may have in mind about this case, that your Honor grant me a bill of particulars addressed to Mr. Dixon at this time as to what is the conspiracy. That is my motion, addressed to the United States to define the conspiracy in support of which this exhibit is offered.

The COURT. So that we do not have a pending motion undisposed of, the motion is denied. That is my formal ruling.

Mr. WHITNEY. Will your Honor give me an exception?

The COURT. Certainly. Now, let us look at this document and see whether we can find anything in it. Let us forget du Pont for a minute and deal with National Lead and Titan Company. McCarty is certainly an officer of National Lead and Titan in the situation. And all we get from here is that he writes to his colleague
800 abroad to be alert about the competitive situation.

Isn't that about right? And let us suppose that

McCarty is on the stand and—

Mr. WHITNEY. Where is that?

The COURT. I have of course summarized, very violently, but that is what I gather is the nub of his letter.

Mr. WEBSTER. That is the epitome.

The COURT. Yes. Suppose Mr. McCarty is on the witness stand, because you are now dealing with an officer of a defendant corporation, and he is on the witness stand and he is asked this question. Would it be subject to the objection for lack of relevance and materiality? We can forget for the moment that this is a letter declaration because it is a character of letter—

Mr. WEBSTER. I think there are other questions but that one is at the threshold.

The COURT. The question is: Didn't you on April 13, 1928, ask your colleague abroad, Dr. Jebesen, to be alert to the competitive situation arising out of the formation of

ICI and the visit of Mr. Ticknor abroad?

Mr. WEBSTER. And I object to that as immaterial.

The COURT. It is awfully thin, Mr. Dixon; you will agree with that.

801 Mr. DIXON. Yes, your Honor. I think some of these documents are and I am frank to admit that. Some of them are in their probative value and their contents are much stronger than others. This document standing alone perhaps does not mean very much—what your Honor would call a very small bit of evidence, and we frankly concede that. But certainly it is evidence here in 1928 after the German companies had been formed and they had notice of the formation and active competition in the United States of Commercial Pigments, and here in the British Empire, or England, of the formation of ICI that—well; as your Honor so aptly put it, “Just keep your eyes open or see what happens here so that we can take such steps as are necessary as they develop to deal with any threat of competition in this field. Now, that is all this document means beyond that.

Mr. WEBSTER. Your Honor, what I am about to say now is without any personal reflection on Mr. Dixon—

The COURT. Of course not. You don't have to say that.

Mr. WEBSTER. —or any of his associates. But one of the vices about a document of this sort, in fact the vice I think about letting into the record a document to which your Honor attaches so little weight, is this: that this document will be used or may be used in some way
802 to drag into this case a lot of names and a lot of sums. Now he tells us here about

“The New York papers this morning published the news of the formation by the Imperial Chemical Industries and certain American financiers of an Anglo-American corporation with a capital of \$10,000,000—which has been formed for the purpose of developing and exploiting new enterprises, chemical and otherwise, in the United States and Great Britain.”

What this Anglo-American corporation is I haven't the slightest information about. It is something that is recited by Mr. McCarty; it appears to have no connection with any agreement in evidence, it has no connection whatever with any fact that is pleaded, and so all through the letter.

Now, he refers to Sir Harry McGowan. Some use may be attempted to be made of that. And Mr. Weisman and Sir Alfred Mond. That I think is the great vice of putting into the record immaterial documents of this character.

Mr. WHITNEY. Your Honor, a moment ago I made a motion to your Honor and your Honor overruled it and I took an exception. In view of your Honor's great patience throughout this trial and the usefulness, in 803 my humble view, of the method that your Honor has followed, having us all assist your Honor in understanding it as we go along, I am unhappy to leave the situation just like that, and if your Honor will allow me I would just like briefly to submit reasons in support of that motion very briefly.

The COURT. All right, very briefly.

Mr. WHITNEY. And they are these: As I say to your Honor it is well recognized now in the practice that bills of particulars before answer are not favored.

The COURT. Only before answering. You get bills of particulars now only before answering.

Mr. WHITNEY. Exactly. They are not favored by the courts.

The COURT. That is true.

Mr. WHITNEY. Particularly in this case, which was brought on very rapidly to trial. The understanding in this case by the parties was that it would be brought on very rapidly to trial and with that view we answered very promptly.

Now, then, we are in this situation. There is a complaint which was answered promptly by a general understanding between the Government and the parties. They go together before the calendar judge and he sets the case for early trial on the understanding that there 804 will not be a great deal of pretrial procedure, and the only pretrial procedure which was suggested, which was only informal, by the Government was that we try to work out a stipulation to facilitate their introducing evidence, and we did.

Now, then, your Honor will observe that if we had raised points of evidence of the same character that were raised before the District Court in Washington in the Gypsum case that is half finished after two years, we wouldn't have gotten anywhere yet in this trial. Now the heart and soul of any defense in these cases must be an understanding of the issues of the defendants. Your Honor will observe that, although your Honor has been very kind, you haven't made one single, solitary ruling in our favor; every single solitary piece of evidence has been admitted, and in admitting it your Honor—

The COURT. Except to the extent that there was a cer-

tain amount of self-denial on the part of the Government as a result of some talk we had the other day.

MR. WHITNEY. That only went to remote materiality, it went to materiality less than this document, in my view. And your Honor would not have excluded it if they had taken the other view, with great respect.

THE COURT. That I don't know.

805 MR. WHITNEY. You have given no indication of it and I don't blame you.

Now the effect therefore is that in practice we haven't here since the documents began, since the agreements were finished—I asked your Honor's pronouncement to the effect that you were going to rigidly hold the Government to a certain position—that we have had absolutely everything in, and that when the materiality was so remote that Mr. Dixon or Mr. Locke were utterly at a loss to explain the materiality and couldn't do so, your Honor with your great ability has said in so many words: I am perhaps making Mr. Dixon's statement for him, I am perhaps making a statement that Mr. Dixon should have made. You did that this afternoon.

THE COURT. Yes. But I do not want to suggest that I thought Mr. Dixon could not handle it himself. I did that to save time.

MR. WHITNEY. I am not suggesting it either, your Honor, not for a minute. I think Mr. Dixon is extremely capable.

Now, that is what makes my motion a fair and reasonable one. Where the district attorney is extremely capable there is the greatest reason for him to be fair enough to the citizen to tell him what the conspiracy is that he 806 is alleging. Now, we are going to be here at this rate for weeks and weeks and weeks. Your Honor, there are 269 exhibits subpoenaed from du Pont and not one single, solitary one of them has yet been offered. We have been here now six and a half days. There are 1309 documents subpoenaed from National Lead, other than the agreements, and we have had in evidence about 75 of them, or about one in 18. Now, here and there a few have been cut out, but very few, and my friends on the other side have told me that they expect now to go steadily along but that everything from here in is important, and that means we have about 1500 exhibits to go in one at a time.

Now if your Honor is going to follow the ruling that your Honor has followed you will observe that it is a waste of time for us to make these objections and that what we

ought to do, as a practical matter, is to print up this file of paper, let the Government sit down and go through with a pencil and mark numbers on them and then let us just go ahead and comment on them one at a time, and Mr. Webster and I take a blanket objection and exception, and we will save endless time. Now, that is what we ought to do if it is going on as it has, your Honor. I respectfully urge that upon your Honor and Mr. Dixon to save the time of everybody, the District Court and the defendants.

Alternatively, if your Honor does not follow
807 that course then it means that we are to present our arguments to your Honor, and I then submit to your Honor that the simplest, the broadest, the most helpful possible item that could be presented would be my very simple one-sentence motion. Now, where are defendants caught these days? If they make motions before trial the district judges downstairs, where we go every Tuesday and Friday, tell us, "Well, don't bring up all this; the modern rules of federal procedure are meant to liberalize procedure in favor of the plaintiffs." We are told that again and again. The Federal Supplement is full of it. "We don't want these motions; go to trial," which is a kind of grand inquest now, not a trial any more in any old-fashioned sense, but a kind of grand inquest. Therefore, that means that the appropriate place to make reasonable and helpful motions is in the courtroom at the trial.

And I ask your Honor, what possible motion could be imagined that could do more to clarify and simplify and help along a vast, gigantic documentary antitrust suit than a motion that the Government attorneys—there are five of them in this room—who have brought the whole proceeding and whom your Honor has so rightly and justly called as able to take care of themselves, should state to us, should take one minute out of 48 hours or five
808 minutes, but state on the record what is the conspiracy that we are talking about.

Now, your Honor and I talked for at least an hour and a half to each other yesterday morning and the main upshot of it was that your Honor brought forward that the point of all importance here was—what is the enterprise? That is what your Honor brought forward. Now then, my motion is that your Honor direct the Government to give us a bill of particulars orally or in writing as to what is the enterprise. In other words, what is the conspiracy charged? And to aid the Government for the

present I can confine the motion to saying, What is the conspiracy in furtherance of which it is alleged that the offer of Exhibit 129 is made? That motion is not jocularly made, your Honor. It is made in the utmost seriousness.

The Court. Do you want to be heard on that, Mr. Dixon?

Mr. Dixon. I do not think that there is anything I can say, your Honor, about the motion. It seems to me it is highly improper. We have made a full, and I thought rather complete, opening statement, extending some three hours or more, and we are endeavoring to expedite the trial in every way that we possibly can. It is unfortunate from du Pont's point of view that we have so many documents perhaps; but that is not an unusual thing in any antitrust case, and we have to develop them in as general a manner as we can, and that is what we are trying to do. And I think in due course of time du Pont will be reached. And I have here in the ones that went to the printer over I believe two days ago now the documents bringing the du Pont Company into this trial in a direct manner. But we can't get to them here if we are to have, as counsel for du Pont says, extended debates or argument on every document. And I merely say to your Honor that in our judgment the motion certainly does not lie and it would serve no purpose even if it were granted.

Mr. Whitney. Your Honor will observe he has not said one, solitary word about the motion. The motion was that he particularize the conspiracy. He hasn't said one, solitary word about it.

The Court. The motion is denied. The Court will see counsel in chambers immediately the recess is begun, which we will take right now.

(Short recess.)

810 (The following exhibits were marked in evidence in the absence of the Court, pursuant to the Court's instructions:)

Exhibit No. 130, May 8, 1928, from Jebson to McCarty.

Exhibit 131, 5/28/28, from McCarty to Jebson.

Exhibit 132, October 18, 1928, Jebson to McCarty.

Exhibit 133, October 31, 1928, McCarty to Jebson.

Exhibit 134, November 9, 1928, Jebson to McCarty.

Exhibit 135, November 23, 1928, McCarty to Jebson.

Exhibit 136, November 27, 1928, Jebson to McCarty.

Exhibit 137, December 5, 1928, McCarty to Jebson.

Exhibit 138, September 18, 1929, Peck to Barton.

Exhibit 139, February 11, 1930, McCarty to George A. Martin.

Exhibit 140, April 1, 1930, Jebesen to McCarty.

Exhibit 141, April 12, 1930, Peter Spence
811 Limited, to Titanium Pigments.

Exhibit 142, April 15, 1930, McCarty to Jebesen.

Exhibit 143, April 26, 1930, Thompson to Barton.

Exhibit 144, August 4, 1930, Jebesen to McCarty.

Exhibit 145, August 5, 1930, McCarty to Jebesen.

Exhibit 146, August 13, 1930, McCarty to Jebesen.

Exhibit 147, August 20, 1930, McCarty to Jebesen.

Exhibit 148, September 3, 1930, McCarty to Jebesen.

Exhibit 149, September 13, 1930, Jebesen to McCarty.

Exhibit 150, September 26, 1930, McCarty to Jebesen.

Exhibit 151, September 26, 1930, McCarty to Jebesen.

Exhibit 152, October 1, 1930, Thompson to McCarty.

Exhibit 153, October 3, 1930, McCarty to Jebesen.

Exhibit 154, October 8, 1930, Jebesen to McCarty.

Exhibit 155, November 21, 1930, telegram, McCarty to
Jebesen.

812 Exhibit 156, November 25, 1930, McCarty to
Jebesen.

Exhibit 157, December 10, 1930, Jebesen to McCarty.

Exhibit 158, December 2, 1930, telegram, Jebesen to
McCarty.

Exhibit 159, December 16, 1930, McCarty to Jebesen.

Exhibit 160, December 10, 1930, Jebesen to McCarty.

Exhibit 161, December 24, 1930, McCarty to Jebesen.

Exhibit 162, January 7, 1931, Ryan to McCarty.

Exhibit 163, February 18, 1931, McCarty to Jebesen.

Exhibit 164, February 2, 1931, M. F. Chase to McCarty.

Exhibit 165, February 5, 1931, McCarty to Mr. March
Chase.

Exhibit 166, April 9, 1930, McCarty to Moses?

Exhibit 167, April 20, 1931, March Chase to Evans Mc-
Carty.

Exhibit 168, April 14, 1931, McCarty to March Chase.

Exhibit 169, October 12, 1928, Extract from
813 minutes of ICI.

Exhibit 170, March 2, 1929, Extract from minutes,
March 2, 1929.

Exhibit 171, March 25, 1929, from Development Depart-
ment to Executive Committee Krebs Pigment and Chemi-
cal Co.

Exhibit 172, April 3, 1929, du Pont Executive Com-
mittee memo; question of purchase of assets of Krebs.

Exhibit 173, April 8, 1929, from Development Depart-
ment to Executive Committee; memo on Krebs Pigment &
Chemical.

Exhibit 174, April 13, 1929, from Executive Committee to Finance Committee; question of purchase of assets of Krebs.

Exhibit 175, March 24, 1927, Agreement between Commercial Pigments and Blumenfeld.

Exhibit 176, December 17, 1929, Agreement Commercial Pigments and Terres Rares.

Exhibit 177, February 18, 1931, Development Department to Executive Committee, re Commercial Pigments to Terres Rares.

Exhibit 178, February 17, 1931, Arthur Young, Broads, etc., to Arthur Young & Company.

Exhibit 179, February 18, 1931, Development Department to Executive Committee, re Commercial Pigments.

814 Exhibit 180, February 19, 1931, WSS to Lamot du Pont.

Exhibit 181, February 19, 1931, Sparre to Grasselli.

Exhibit 182, April 18, 1931; Sparre to Executive Committee re Commercial Pigments Corp., one enclosure.

Exhibit 183, April 22, 1931, Cornish to Jebesen, with telegram attached.

Exhibit 184, April 22, 1931, Sparre to Executive Committee, Commercial Pigments Corporation.

Exhibit 185, June 11, 1931, Fisher to Sparre, re proposed consolidation.

Exhibit 186, June 16, 1931, Jenney to Sparre.

Exhibit 187, June 16, 1931, Sparre to Board of Directors, Grasselli, re Commercial Pigments.

Exhibit 188, June 16, 1931, Sparre to Executive Committee, re Commercial Pigments.

Exhibit 189, June 24, 1931, excerpt from Directors' Minutes of Commercial Solvents.

Exhibit 190, June 24, 1931, memorandum from H. Bradshaw, with the heading, Experimental Station, E. I. du Pont, re Commercial Pigments Patent Situation, consisting of 6 pages.

Exhibit 191, June 25, 1931, a report from Neilsen, 815 Assistant Comptroller to J. B. Eliason, re Agreement of Reorganization between Grasselli, Commercial Solvents and du Pont, consisting of 9 pages.

Exhibit 192, June 3, 1931, from Development Department to Executive Committee, Grasselli, re Commercial Pigments.

Exhibit 193, July 8, 1931, Resolution of du Pont re Proposed Consolidation of Pigments Business of Grasselli with that of Commercial Pigments.

Exhibit 194, July 7, 1931, Ticknor to Grasselli.

Exhibit 195, July 7, 1931, Agreement, Grasselli, Commercial and du Pont, 13 pages.

Exhibit 196, July 8, 1931, Beadle to Sparre, re Commercial Pigments.

Exhibit 197, July 9, 1931, Grasselli to Commercial Solvents.

Exhibit 198, July 13, 1931, Development Department to Executive Committee, re Krebs Pigment.

Exhibit 199, December 8, 1931, Travancore Minerals Co., Ltd., long memorandum with appendix.

Exhibit 200, September 11, 1931, Jebson to McCarty.

Exhibit 201, October 30, 1931, McCarty to Jebson.

Exhibit 202, November 17, 1931, McCarty to Jebson.

816 Exhibit 203, January 15, 1932, McCarty to Jebson.

Exhibit 204, February 10, 1932, Thompson to Barton.

Exhibit 205, February 15, 1932, Barton to Thompson.

Exhibit 206, February 20, 1932, Barton to Meredith.

(Adjourned until Thursday, December 14, 1944, at 10:30 a.m.)

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, December 14, 1944,
10.30 o'clock a.m.

Trial resumed.

Mr. DIXON. On reading the record yesterday I see that Plaintiff's Exhibit 129 was not formally offered or admitted in evidence. I wish to offer it at this time.

The COURT. Very well.

(Plaintiff's Exhibit 129 for identification received in evidence.)

The COURT. Do I understand that you gentlemen have a stipulation to present?

Mr. WEBSTER. We have no stipulation, your Honor.

The COURT. Did you go through with the discussion we had yesterday in chambers?

Mr. DIXON. Yes.

The COURT. Let me state on the record that counsel and the Court having conferred in chambers with respect of methods of expediting the trial of the issues of this case, they agreed to mark all the exhibits tendered by the Gov.

ernment in evidence, reserving to each of the defendants respectively an objection to each and every exhibit so tendered, and that the exhibits being so deemed received in evidence shall then be commented on in rotation by counsel for the respective parties. And if there be an objection relating to the authenticity of a document or the authority of the author of the document to declare what is attributed to him, then such objection shall be taken at that time.

You may add anything you like to my conception of the understanding.

Mr. WEBSTER. Inasmuch as the rules require us to give our reasons for our objections, it occurs to me that perhaps the statement should indicate that we may be deemed to have stated our reasons in full for our objections to each and every document and not be taken to have waived the objection on that ground.

The COURT. Such grounds of objection, however, to exclude the ground of best evidence, genuineness, authority, and other items commonly included within the idea of competence, in that sense, unless expressly asserted at the time the document is commented on.

Mr. WEBSTER. I am now talking particularly about objections in the nature of relevancy and materiality of the sort that have been heretofore mentioned.

The COURT. Very well. It will be so deemed.
893 Exhibit 170.

Mr. DIXON. This, your Honor, is the minutes of a meeting held at Wilmington, Delaware on March 2, 1929, in which it was agreed that any Canadian rights on any patents owned by du Pont or ICI, should be granted freely to CIL unless prior commitments to third parties prevented such an arrangement, and it was agreed that CIL was obligated to give du Pont and ICI similar rights.

894 We just want you to have that before you when we come to the Canadian agreements and discussions of the negotiations relating to the acquisition of Commercial Pigments.

Mr. WHITNEY. If your Honor please, in other words I take it Mr. Dixon is saying, consistently with the complaint, that he is not making any claim that these agreements were in themselves restraints on the United States trade or foreign trade or commerce in it or out from it, and that he is giving them as a background for an understanding of the Canadian agreement.

The COURT. Very well.

Mr. WEBSTER. I take it your Honor is giving me a continuing objection to all evidence of this character?

The COURT. The same as Mr. Whitney has with respect to yours.

Mr. WEBSTER. Yes.

903 Mr. WEBSTER. I understand my objection runs to all of these without repetition.

The COURT. Have you any need for any special one along the line, especially since you have a very universal, all-comprehensive, objection to everything that is going in—moving in behind a shield all the time.

1076 Mr. DIXON. We would like to call upon defendant du Pont pursuant to the request of paragraphs 12 and 23 of the subpoena to produce any memoranda of conferences, if any, made by du Pont & Company or any official connected with that company, or Krebs Pigment & Color Corporation, concerning or relating to any negotiations had with National Lead Company or Titanium Pigment Company, relating to the contract Exhibit No. E previously admitted in evidence.

Mr. WHITNEY. The answer to both those questions is that there are no such documents. 12 related to the—well, as to both, the answer is there are none.

Mr. DIXON. I take it that may be so stipulated in the record; it won't be necessary to call anyone.

Mr. WHITNEY. Yes.

The COURT. It is so stipulated.

1208 The COURT. 226?

Mr. DIXON. We now come to an exhibit which I am sure my friend Mr. Whitney is not going to object to, one in which, among other things, du Pont gets the low down on Dr. Blumenfeld firsthand, via Dr. Blumenfeld's friend Donegani.

The COURT. Who is the author of it?

Mr. DIXON. This is a report by another Mr. Chase. This is P. H. Chase, and, as I understand it, he is in no way related to the team of Ticknor and Chase. He was the head of the Paris office, as I understand it.

Is that correct?

Mr. WHITNEY. Correct.

1429 The COURT. Why don't you let Mr. Webster speak first?

1430 Mr. WHITNEY. I should have done that. I will tell you why. Because I thought that perhaps technically this was within the field of objection which your Honor hasn't heard since we started the new system a week ago.

and that I was entitled perhaps to call to your Honor's attention that here we were coming back to a type of exhibit, of which we will have a great many, that fall within the second continuing objection, the first one being the timing objection that we had not yet been connected, which I always maintain, and the second being an objection that—perhaps they are really one objection—that because we are not connected we are not bound by statements in furtherance of the conspiracy.

Now I do want to comment on the letter, but I have come to the end of it, calling to your Honor's mind the objection side of it, so I will subside and come back to the other later for only a few minutes.

1435 The COURT. Exhibit 271.

Mr. DIXON. Your Honor, this exhibit, the original of which was subpoenaed from the defendant du Pont, as I understand it, was not in the du Pont files. A copy of this letter was in the National Lead files. It is my understanding that the requirements of proof of practice and mailing of National Lead have been deemed to be or are
1436 waived by the defendant du Pont on this exhibit. Is that correct?

Mr. WHITNEY. That is correct, Mr. Dixon. I should only say, to clarify to his Honor, that that is not the consequence of the stipulation.

The COURT. I understand.

Mr. WHITNEY. That is due to the fact that we cannot find this exhibit anywhere. There are about a dozen or so like that here and there. Mr. Rupprecht is dead and we decided that we would waive the objection that the stipulation reserved and assume for the purpose of the case that we did get it.

The COURT. National Lead says they sent it to you?

Mr. WHITNEY. And we stand upon our continuing objection that we are not bound by what Mr. Beschorman said.

Mr. DIXON. In view of the fact that this was outside of the stipulation I wanted the record to be clear on that point, your Honor.

The COURT. I understand that.

1467 The COURT. 278 is marked for identification.
(Exhibit 278 marked for identification.)

Mr. DIXON. We will endeavor to introduce or to produce that letter. I had it under subpoena today and I did not know whether we were possibly going to reach it or I would have had the party here.

Mr. WHITNEY. I would like to say to your Honor, in order

to be ultra fair to the Government, we went out of our way to tell them this on Monday specifically that we were not going to agree to this letter which we have not seen. And the substance behind it, as your Honor also—

The COURT. Well, I won't read it. I have folded 1468 it over for the very reason—I won't even read it by accident.

Mr. DIXON. You are quite right, Mr. Whitney. And I again state that I could perhaps have produced that here this afternoon. I have told the company not to bring it. But I will do it.

The COURT. As far as I am concerned, it is not here. You can assume throughout the case, gentlemen, that I don't read exhibits marked for identification. Therefore, don't make an argument based on it and assume that I know what you are talking about, because if it is not in evidence I do not read it, unless I am obliged to read it in order to determine whether to receive it in evidence.

Mr. WHITNEY. I just say, having passed 277 exhibits, I didn't object to this purely because of its incompetence, but because I thought substantively it ought not to be in the case, and my objection is upon the ground of incompetence.

The COURT. The objection is good and it is sustained.

1503 GEORGE G. FOWLER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. DIXON:

Q. Will you state your address, Mr. Fowler?—A. My business address is 551 Fifth Avenue, New York.

Q. What is your position?—A. I am secretary of Imperial Chemical Industries, New York, Ltd.

1504 Q. Imperial Chemical Industries Ltd. of New York was served with a subpoena to bring with you the original, or copy thereof if the original was not available, of a letter dated August 3, 1933, from E. I. du Pont de Nemours & Company, Inc., European manager, initials HHE with additional initials AAD thereon, addressed to Leonard Smith, Esq.; Imperial Chemical Industries Ltd., Milbank S.W.I., the caption on said letter being "Titanium Pigment Agreement," and also bring with you the enclosure referred to in said letter.

Do you have the original of said letter with you?—A. I have a letter, a copy of a letter, dated August 3, 1933, on a flimsy of the old address of I.C.C. New York, Ltd.

Q. Now, as secretary of Imperial Chemical Industries, Ltd. of New York you are in charge of the files and the records of that company?—A. Of certain files.

Q. Was such a letter or a copy thereof found within your files by you?—A. This was found in files set aside by the company because they contained letters and documents extracted from our files by employees of the Antitrust Division, subject to a subpoena served on I.C. New York, Ltd. in September, 1941, and I found them in those files when I arrived in this country in December, 1941.

Q. But you were not with the company prior to 1905 that time here in the United States?—A. I was not prior, no.

Q. But this letter which was subpoenaed and the enclosure therein was in the files of Imperial Chemical Industries, Ltd. of New York?—A. I presume they were prior to that because—I should amend that. This letter of August 3rd, the copy we have, is in a separate file; the letter of July 24th headed "Titanium Pigment Agreement", which is also on a flimsy of I.C.I. New York at the old address, 285 Madison Avenue, that letter of July 24th was in the files of our company in a separate file from this letter of August 3rd, which had been extracted by the agents of the Antitrust Division. This has been extracted by the agents of the Antitrust Division.

Mr. DIXON. We offer in evidence Plaintiff's Exhibit 278. I might add, your Honor, that the enclosure also subpoenaed is already in evidence as Exhibit 276 on page 1146.

Mr. WHITNEY. I think you mean a letter, of the same tenor as the enclosure is in evidence. You don't mean that the letter annexed to this so-called flimsy—

The COURT. He means a duplicate.

Mr. DIXON. That is right.

Mr. WHITNEY. Yes. Now, your Honor, in submitting my objection to this offer I will say right away that Mr.

1506 Fwing is in the courtroom and can testify. I think this evidence is incompetent and I object to the introduction of this exhibit. It is, as described by the witness in his own words, a flimsy, in other words a piece of paper, with no signature, found by the witness in the office of a New York corporation to whom, if there were an original, it was not addressed. In other words, it is simply a piece of paper picked out of the files of the company in New York, which is no evidence whatsoever that a letter was written, addressed and sent of that character

in London between two parties, neither of whom is on the witness stand.

The COURT. Now, Mr. Dixon, just how do you understand that you have cured the problem of competence by the line of proof that you have offered? As I gather it, the witness is an officer of a company which is not the addressee of the letter and is not an official of the company of the sender of the letter. If I am to draw the inference that the company named is in some way an agency or affiliate or something of the address company on the document, on Exhibit 278 for identification, it would simply prove custody at most. That is not quite sufficient to permit its receipt without more. There may be some circumstances under which custody alone might be sufficient, but I doubt that sufficient foundation has been laid for it in this case.

1507 Mr. Dixon. The reference to this exhibit, your Honor, I believe has been previously shown through Exhibit 276, namely, that there is such a letter, and Exhibit 276 is shown to be, that is at least a copy of that letter, in the files of this witness or of this corporation. The original of the letter of which this apparently is a copy is not within the jurisdiction of this Court; it having been addressed, and showing on its face the address, to I.C.I. of England, I mean in England; therefore it is obviously not within the jurisdiction of this Court.

The COURT. That does not prevent an examination of a person. We have gone way beyond that in our jurisprudence.

Mr. Dixon. I was not aware that Mr. Ewing was here in the courtroom, but—

The COURT. I don't want to put you to the necessity of putting him on, if you will indicate to me in a way that I can comprehend just how you understand that the proof elicited from the witness on the stand has corrected the deficiency in making this document competent. Maybe I just don't grasp the point. This is, after all, the second of January, 1945, and we may be all somewhat sluggish.

Mr. Dixon. May we put it this way, your Honor. This exhibit purports to be, if the original were available, a letter from the European manager of the defendant du Pont to I.C.I. of London.

1508 The COURT. That is right. Of course, we are not dealing with relevance; we are dealing here with authenticity, the existence of this paper. That is what you are now trying to establish.

Mr. DIXON. Correct. Now, that there was such an exhibit as we are endeavoring to introduce here I submit is evident from the fact that this corporation has within its files a copy of Exhibit 276, already admitted in evidence as a letter from the defendant to H. H. Ewing, European manager of the defendant du Pont.

The COURT. 276? You are wrong about 276. 276 is a letter written from the Foreign Relations Department to Mr. Rupperecht.

Mr. DIXON. If your Honor will look at the next page, it is on pages 1146 and '7, which are part of that exhibit—

The COURT. Oh, I see.

Mr. DIXON. And 1148, you will find, that the letter dated July 24, 1933, to Mr. Ewing which as I stated is a part of Exhibit 276, a copy thereof is in the files of the defendant corporation.

The COURT. All right. That is Exhibit 276.

Mr. DIXON. That is right.

1509 The COURT. How does that prove to identify 278?

You are referring to the last paragraph?

Mr. DIXON. Now, Exhibit 278 which we are offering in evidence, if the original thereof were available, would of course, it seems to the Government, be admissible in evidence assuming the original could be produced.

The COURT. Oh, no. It goes beyond that as a matter of fact. We are not dealing with it on the best evidence rule. That is not what I understand the objection of Mr. Whitney is. That is all that original and copy business would be concerned with as to whether this would be the best evidence. For all we know this is a piece of paper that one of the junior filing clerks in the office of du Pont typed out in order to get practice on the machine; for all we know at this stage of the proceeding, and manifestly if that were the fact this would not be admissible. You must therefore go further and show that Exhibit 278 for identification was in fact a communication made by a person authorized to make it on behalf of du Pont if you want to use it against du Pont. It is that link that is lacking in the face of objection, a link which we sometimes overlook when there is no objection. Now that is the problem, and I do not see how Mr. Fowler is going to supply it for you.

1510 Mr. WHITNEY. By the way, your Honor, it is a ribbon copy; it is not a carbon; it is an original typed paper.

The COURT. I would not care if it was a carbon. I would

not care if it was a photostat. I do not think I am permitted to draw the inference that simply because it is in existence that it was created by persons authorized to create it.

Mr. WHITNEY. Had your Honor looked at Exhibit 276 to which Mr. Dixon called attention, because it was written several weeks before the offered paper purports to have been written and it says:

"no doubt I.C.I. are familiar with it and may be discussing it with Ewing, resulting in some embarrassment to him through his ignorance in the matter."

I don't think that goes anywhere to support the offer of this piece of paper.

Mr. DIXON. On the question of authority, which I assume is the question on which the objection is based—

The COURT. It is authority and authenticity both, neither of which has yet been established. All that has been established, assuming that Mr. Whitney is willing to overlook the distinction between I.C.I. of New York and I.C.I. of

London, is custody. Sometimes that serves the 1511 purpose. I don't think that serves the purpose here.

Mr. WHITNEY. With very great respect, in view of the fact that we have brought Mr. Ewing here so that Mr. Dixon can find out the truth about this matter if he so wishes, I am not waiving the distinction between I.C.I. of New York and I.C.I. of London, or anything else. On the very point of authenticity I am prepared to furnish a witness who knows the story and under the Federal Rules he can cross-examine him all he likes.

The COURT. If that is the fact then even custody is not established.

Mr. WHITNEY. No.

The COURT. Of course I am not permitted at this stage to draw any distinction between the identity of I.C.I. of New York and I.C.I. of London. For all I know they are two antagonistic and hostile corporations.

Mr. DIXON. In view of the fact that Mr. Whitney has stated Mr. Ewing is here, your Honor, we are perfectly willing to withdraw this witness and to call Mr. Ewing to the stand to determine whether or not this letter was ever written by Mr. Ewing.

The COURT. Is there any cross-examination of this witness?

Mr. WHITNEY. No.

The COURT. You are excused, sir.

1511a (Witness excused.)

The COURT. Do you want to mark for identification the document he has produced?

Mr. DIXON. Oh, this has already been marked for identification.

The COURT. No. The document he produced?

Mr. DIXON. No, your Honor.

The COURT. You don't want that marked for identification?

Mr. DIXON. No, if your Honor please.

1512 HOMER H. EWING, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. DIXON:

Q. Will you state your present address, Mr. Ewing?

A. My present business address is Wilmington, Delaware.

Q. And by whom are you employed?—A. E. I. du Pont de Nemours and Company.

Q. And in what capacity?—A. My present capacity is Commercial Investigator, Development Department.

Q. Directing your attention to the period of August, 1933, by whom were you employed at that time?—A. I was employed by E. I. du Pont de Nemours and Company.

Q. And in what capacity were you employed?—A. As European manager and also manager of the London office.

Q. And as such you were in charge of the affairs of the du Pont Company in that area, that is in the European area and the London office at that time?—A. Indirectly.

Q. I will hand you what has been marked as Plaintiff's Exhibit 276, and ask you if you ever saw that letter or document before?—A. I have no recollection of ever having seen this letter.

Q. You say you do not recall ever having received that document?—A. That is right.

The COURT. You mean the letter of July 24, 1933?

1513 The WITNESS. That is right.

Q. That is addressed to H. H. Ewing, Manager of London Office, dated July 24, 1933.—A. That is correct.

Mr. DIXON. That is on page 1145.

Mr. WHITNEY. He asked the witness about 276, which is addressed to C. H. Rupprecht, President.

The COURT. It happens to include more than one document. He is referring to the document now on page 1146.

Mr. DIXON. Yes. A part of that exhibit.

Mr. WHITNEY. I think the record will show he said 1145.

The COURT. Referring to the document printed on page 1146.

Mr. DIXON. Which is a part of that exhibit.

Q. Will you read that again, Mr. Ewing, and see if that refreshes your recollection as to whether you ever received such a letter?—A. I may have received this. I have no definite recollection of it.

Q. Are you acquainted in a general way with the subject matter of that letter?—A. No. Probably this was the first information I had had on this subject.

Q. You mean that is the only information, according to your recollection, that you ever received about the titanium agreement or proposed agreement between Krebs and National Lead?—A. There may have been others, but I have no recollection of any at the moment.

Q. Well, did you ever discuss this agreement with anyone while you were at the London office connected with du Pont or Imperial Chemical Industries Limited?—A. I do not believe I ever did.

Q. Did you ever write any letters or have any correspondence with Imperial Chemical Industries Limited concerning this proposed agreement between Krebs and National Lead?—A. I have no recollection at this time.

Q. In other words you want this Court to understand that you have no recollection at all about this agreement, is that correct?—A. That is correct.

Q. Do you recall any meetings had in London in 1931 at which titanium was discussed, say September of 1931?—A. There were meetings in London when we discussed the European situation with regard to titanium.

Q. When you do now recall some such meetings, or at least some discussions had with reference to the European titanium situation?—A. Only with reference to that.

Q. And as early as 1931?—A. That is correct.

Q. The fall of 1931. And it is a fact, is it not, that you received correspondence from the Wilmington office, the foreign relations department of du Pont, with reference to this proposed agreement between National Lead and Krebs? That is the fact, is it not, Mr. Ewing?—A. There were some letters came over about that, much later; later than 1931, however.

Q. So that you did receive from say September 1931, up until July of 1933, correspondence from the foreign relations department of du Pont at Wilmington, to yourself as director of the London office and the European office of the du Pont Company, is that correct?—A. On what subject?

Q. On the subject, of course, of titanium.—A. As regards Europe?

Q. That is right.—A. Only as regards Europe.

Q. Now don't you recall some correspondence with reference to the proposed agreement in the United States between the Kgebs Corporation and the Titanium Pigment Company and the National Lead Company, engaged in the titanium business?—A. There was one letter to my recollection, only one, and that was in 1933; nothing before that.

Q. Did you ever have any conversations with anyone of Imperial Chemical Industries Limited at London with reference to the proposed agreement between Krebs and Titanium Pigment Company in the United States?—A. Not directly.

Q. Well, did you ever have any indirectly?—A. 1516 Yes. They spoke to me about it.

Q. And what was the substance of your discussions, generally, if you recall?—A. The recollection is quite faint but it had to do more particularly with the European phase of the business. I knew nothing of the agreement in the United States if, in fact, there was one at that time.

Q. Well, it is a fact, is it not, Mr. Ewing, that you did receive advice from the foreign relations department of the du Pont Company at Wilmington concerning the possibility of this proposed agreement being executed?—A. Only one letter.

Q. That is the only one you recall?—A. That is the only one I recall.

Q. Now you say you do recall some further conferences or discussions relating to titanium matters in London commencing with September of 1931. Do you recall who was present at those discussions?—A. The only discussions that I ever had in London during that year, according to my recollection, are meetings with Mr. Ticknor and Mr. Chase of Commercial Solvents, together with Mr. Burton, their European manager.

Q. And Mr. Burton was, you say, the European manager of what company?—A. Commercial Solvents Corporation.

Q. And he was also connected with Travancore 1517 Minerals Company, was he not?—A. That is correct.

Q. Did you ever hear of that company before?—A. Oh, yes.

Q. And in what connection?—A. As manager of the London office it was our function to represent the com-

pany in dealings with Travancore Minerals, Inc. We were not members of the board, however.

Q. When did you leave the London office, Mr. Ewing?—
A. December 15, 1935.

Q. So that you were in charge of the London du Pont office until what time?—A. Between July 1930 and December 1935.

Q. Now coming back to this exhibit that I have shown you some time ago, or a short time ago, Plaintiff's Exhibit 276: Do you recall whether you ever had any conversations or transmitted any correspondence to Imperial Chemical Industries Limited with reference to the titanium pigment agreement?—A. I have no recollection. I may have done so.

Q. I will hand you what has been marked for identification Plaintiff's Exhibit 278, and ask you to examine the same?—A. This is a copy of a letter.

Mr. WHITNEY. May I just look at this paper?

Mr. DIXON. Yes (exhibiting).

The COURT. A copy of a letter you wrote?

1518 The WITNESS. I have no recollection of having written this, sir.

The COURT. What did you say when this is a copy of a letter?

The WITNESS. Well, it is not signed. It has not any signature.

The COURT. It is a photostatic copy of a copy, is that what you mean?

The WITNESS. Yes, sir.

Q. The initials HHE are the initials for your name, are they not, Mr. Ewing?—A. That is correct.

Q. Examining that letter, would you say that you did write such a letter to the Imperial Chemical Industries Limited?—A. The chances are that I did write this letter.

The COURT. The chances are you did?

The WITNESS. I did, but I have no recollection.

The COURT. Who is AAD? Is that your secretary?

The WITNESS. That is Anna A. Davidson.

The COURT. A girl who worked in your employ?

The WITNESS. That is right.

Q. Where is she now, if you know?—A. She is still in England as far as I know.

Q. Now you say you think you did write this letter?—

A. I may have.

1519 Q. Now will you just tell the Court where you got the rather complete information indicated in that

letter relating to the titanium industry throughout the world, to use your specific language?

Mr. WHITNEY. I object—

The COURT. I suppose there will be an objection to that, but before you get to that, are not you prepared to offer that exhibit?

Mr. DIXON. Yes, your Honor. We are offering it in evidence.

The COURT. Is there any objection?

Mr. WHITNEY. No objection.

The COURT. All right, Exhibit 278 is received in evidence.

Mr. WEBSTER. If the Court please, I suppose I should once again after the holidays—

The COURT. Renew your objection?

Mr. WEBSTER. Reserve my objection to all these du Pont documents on all the previously urged grounds.

The COURT. All right, you have an objection and exception. It is received against du Pont and received against the other defendants subject to the reservation you have made.

(Plaintiff's Exhibit 278 for identification received in evidence.)

520 The COURT. Now what was the question?

Mr. WHITNEY. I objected to it because he described the letter by saying, "the rather complete information indicated in that letter."

Mr. DIXON. Yes. I will withdraw that question.

The COURT. Very well.

Mr. WHITNEY. Your Honor, my friends point out to me that I have overlooked an objection that I am presuming your Honor will want to overrule, but I do want to make it seriously, if your Honor will permit, to Exhibit 278.

The COURT. Yes.

Mr. WHITNEY. I do want to object on the ground that Mr. Ewing in his capacity as European manager, as described in the evidence, had no authority to bind the du Pont Company to any act or statement of this character—lack of authority.

The COURT. Very well. The objection is overruled in the light of the suggestion in Exhibit 276, and for other reasons.

1521 Q. Handing you Plaintiff's Exhibit 278, will you state to the Court if you can where or from what source you secured your information expressed in the second paragraph of this exhibit with reference to the

titanium pigment industry generally?—A. From time to time Mr. Ticknor came over to Europe and told me of the interest of the various Blumenfeld interests in Europe, especially Donegani in Italy, and it was from that source and from my contacts with Blumenfeld and Donagi and I.C.I. that most of this information about the situation throughout the world on titanium was gathered.

Q. Did you have any conversations with Mr. Pickard about the titanium business in Europe or the United States?—A. In Europe, yes. He would come over to Europe about once a year, and on one occasion I do recall that we met Mr. Donegani in Paris.

Q. Do you recall when you met Mr. Donegani in Paris?—

A. I believe it was in '33. It may have been 1932; I am not sure.

Q. Do you know what business Mr. Donegani was then engaged in?—A. Oh, yes. He was a leading figure in the Italian dynamite companies. We were associated with him in a small Duco company in Italy. He was director or the chairman of that board, and I was one of the directors.

The COURT. The reference I take it was to the 1522 chemical and not to the political aspects of the situation.

The WITNESS. Quite right, sir.

Q. Again referring to this Exhibit 278, I notice that you state therein that:

"the move which has culminated in this agreement in the U.S.A.,"

and by that time the agreement, the Krebs agreement, had been executed; is that correct?—A. I had been advised by Mr. Swint, and that was the first advice I had had.

Q. That is by Exhibit 276?—A. Yes.

Q. In this letter you referred to a patent pool. Now, just what patent pool were you referring to in this letter; Mr. Ewing?—A. That seems to be a loose phrase—"patent pool," but the licensees—

Q. You mean it is loose now?—A. Yes.

Q. But not at that time you didn't regard it as a loose phrase. All right, go on.—A. Mr. Donegani—

Mr. WHITNEY. Wait a moment. Is that a comment or a question?

Mr. DIXON. It is a question.

The WITNESS. I didn't reply.

Mr. WHITNEY. Just wait until the next question—until he has replied to the last.

The WITNESS. Pardon me.

The COURT. Do you regard—

1523 Mr. WHITNEY. "Did you—"

The COURT. Did you regard that as a loose phrase?

The WITNESS. We spoke quite freely in 1932 about patent pools.

Q. So you didn't regard it, as I take it, as a loose, as you describe it, phrase at that time?—A. That is right.

Q. At least the time you wrote the letter.—A. That is right.

Q. Just what did you mean by "patent pool" then at the time this letter was written, Mr. Ewing?

The COURT. And in this letter.

Mr. DIXON. That is right. In this letter.

A. This is only my opinion and it goes back to 1932. In those days if one group had a certain type of patent, another corresponding group had a type of patent, they could and did in a good many instances cross-license one another for the purpose of efficiency in the manufacture of the product, because each patent was supposed to add some part of efficiency to the chemical operation.

Q. So that according to your conception of the term "patent pool" as used on Plaintiff's Exhibit 278, you regarded it merely as a means of establishing cooperation between the parties who entered into the pool?—A. Technical cooperation only.

Q. You mean only technical cooperation?—A. That is right.

1524 Q. Will you explain to the Court just what you mean by technical cooperation.—A. Patents cover only a part of discovery, and there are certain additional know-how not disclosed in patents through perhaps the inability to disclose it, which can be imparted by cooperative work, and the exchange of patents one with another company opens the door for disclosure of all the know-how as well as the patentable idea.

Q. So that the patent pool as used in your letter of August 3, 1933, means to you a combination of patents and the exchanging of technical information between the parties who own the patents so that they can be, shall we say, more efficiently worked by the parties to the pool?—A. That is correct.

Q. Do you have anything else to add to your understanding of the words "patent pool" as used in this letter of August 3rd?—A. No.

Q. How long had you been with the du Pont Company before you took over the management of their London office?—A. I came with the company April 8, 1918; so between 1918 and 1930—a period of 12 years.

Q. Well, had you during that period of time had any other experiences with agreements such as the titanium pigment agreement which you referred to as a patent pool?—A. We had many agreements, not of this 1525 particular type but different types.

Q. So that this was not the first time that you had had occasion to use or at least refer to the term "patent pool" in the sense that you have described it?—A. That is correct. That was a recognized term.

Q. And you want this Court to understand that that was the only understanding that you had of the term "patent pool", as you used it in this exhibit?—A. That is the only understanding that I had at that time.

Q. Well now, if that is the fact, will you kindly state to the Court what you meant when you stated further in this letter that:

"We look upon this patent pool as a definite advance in cooperation and the strengthening of both parties' position to the exclusion of outsiders?"

A. Only as regards technical information.

Q. So that this "to the exclusion of outsiders" does not add anything or does not broaden, shall we say, the interpretation that you previously gave to the Court as your interpretation of a patent pool as used in this letter?—

A. Not at all. It doesn't add anything.

Q. So I assume we might call that surplusage, is that right?—A. Yes; so much gratuitous information tacked on.

Q. Just a mere gratuity—that doesn't mean a thing?—A. So far as I am concerned.

1526 Q. It might well have been left off the letter?—

A. Quite right.

Mr. DIXON. That is all.

Cross examination by Mr. WHITNEY:

Q. Mr. Ewing, did you have authority on behalf of the du Pont Company during the years 1919 to 1935 to negotiate the terms of any cross-license agreement?

Mr. DIXON. I object to that, your Honor.

The COURT. I will allow it.

A. I had no authority directly to negotiate anything. I was merely an agent for the company in the United States and all authority had to originate here.

Q. By the word "directly" do you mean that the authority had to originate here?—A. Yes.

Q. Were you given authority to negotiate with any European company a cross-license agreement in the field of titanium at any time?—A. No.

Q. Did you ever execute on behalf of the du Pont Company any agreement in the field of titanium?—A. No.

Q. Did you ever execute any letter or memorandum meant to express or designed to express any commitments on behalf of the du Pont Company?—A. I was not permitted to.

Q. Or any informal agreement?—A. No.

Q. Now with reference to your letter and the statement that the phrase "to the exclusion of outsiders" was
1527 gratuitous information, who gave you the information?—A. I received apparently information from

Mr. Swint that an agreement had been signed in the United States. That was the first knowledge that I ever had of it.

Q. By "apparently" do you mean that you were referring to Exhibit 276, pages 1146 to '8 that were shown you by Mr. Dixon on the direct examination?—A. Yes.

Q. You mean by "apparently" that you do not now remember receiving that letter but that apparently you did receive it?—A. That is correct.

Q. And that therefore that letter was the source of your information?—A. That is it.

Q. Did you receive any other letter prior to August 3, 1933, from Mr. Swint on this subject?—A. I can't recall now.

Q. Do you think you did?—A. I don't believe I did.

Q. Did you receive any other letter from any other officer of the du Pont Company prior to August 3, 1933, on this subject?—A. That to my recollection is the only advice that I had of this National Lead-duPont agreement.

Q. Now the paragraph in the letter which Mr. Dixon was reading to you begins: "The titanium business throughout the world seems to be divided into two groups—the one which may be classified as the 'Blumenfeld
1528 catini in Italy, Terres Rares and United Chemical

" * * * Aussig, and the other: the 'IG', or 'National Lead group' " et cetera. What was the source of your impression expressed by your word "seems" to that effect?—A. That information was gathered from various talks with Messrs. Ticknor and Chase, Blumenfeld, Done

gani in our regular work throughout the European Continent at that time.

Q: When you say "We look upon this patent pool as a definite advance in cooperation", are you referring to yourself and Mr. Ticknor?—A. I very seldom ever used the word "I" in writing any of my letters. "We" should be translated as "I." It is used collectively but refers to no one else in particular that I can designate now.

Q. You mean that you yourself, Mr. Ewing, sitting in London in August of 1933, personally regarded this so-called patent pool as a definite advance in cooperation?—A. That is right.

Q. And the rest of it—A. That is right.

The COURT. Mr. Webster?

Mr. WEBSTER. No questions.

The COURT. You are excused, sir.

(Witness excused.)

1577 Mr. CAPLAN. The next group of exhibits relates to the Leuchs patent which was purchased. The first exhibit of this group, Exhibit 322, is by Barton to the Technical Committee and says that the Technical Committee at its meeting February 8, 1933, decided that it would not be advisable to acquire an interest in the Leuchs patent, but upon final review it appeared the principal reason why the Mecklenburg and Blumenfeld patents were granted may have been because the Leuchs German patent, although applied for at a much earlier date, was not published until September 11, 1931, and therefore may have an important bearing upon the validity of the Mecklenburg and Blumenfeld patents. Mecklenburg and Blumenfeld were owned by Krebs and were among the 17 patents in the so-called patent controversy.

In the last paragraph of the exhibit Barton says:

"As this Leuchs patent seems to have a definite disclosure which would anticipate the Blumenfeld and Mecklenburg features of separately preparing accelerators of titanium precipitation, it is recommended that the Leuchs patent and related patents be submitted to Mr. Peck for study and opinion."

1578 Is it understood that I will proceed through this Leuchs group?

Mr. WHITNEY. Yes, I think you will agree that the words "Technical Committee there mean a National Lead committee?"

Mr. CAPLAN. Yes, that is right.

2086 Mr. DIXON. This next Exhibit, 710, from CTP to

National Lead, is an inquiry as to whether CTP can sell Blanc Fixe manufactured by BTP in Canada.

Exhibit 711 is the reply of National to that inquiry in which he points out again what we have already seen, that the Licensed Field in the Canadian agreements did not include extender pigments as such and that presumably the Canadian Company would undertake to sell the British product only with the consent of the board of directors, and that that group would probably want to know the attitude of CIL and National Lead upon that question.

The next exhibit, 712, is a memorandum relating to the Canadian agreements prepared by Mr. Asselin of CIL in which he points out what will be—

Mr. WHITNEY. Pardon me, Mr. Dixon. Is that produced from the files of National Lead?

Mr. DIXON. Yes.

Mr. WHITNEY. The same comments go to that one as to the other one, your Honor. It is the same type of exhibit. Indeed, this I think carries internal evidence of its sketchy, and I think it right even to say irresponsible, character. The use of the words "will grant" is utterly unwarranted by anything that we know, and I must say that having sat here all morning we know a great deal. This cannot remotely be read literally as having any weight in the case. It is 2087 the sort of thing that a man sits down after a great long series of conferences and sketches out without any effort to be correct.

I suggest again to your Honor that in this case I think if we can find a boxing term lower than "feather" I would like to offer your Honor that that be the weight of this exhibit. This is just plain junk to me, this three-page memorandum.

Mr. DIXON. Still commenting on this exhibit, your Honor, this summarizes the discussions apparently had with reference to the matters under discussion between the—

Mr. WHITNEY. What possible right have you got to say that?

Mr. DIXON. (Continuing)—titanium pigments, titanium tetrachloride, titanated lithopones and titanium compounds which cannot be used as pigments, all of which in the previous exhibits were amply referred to as being subjects of discussion for an exchange of patents and patent rights, the broadening of the Licensed Field as defined in the agreements between the Canadian companies and National Lead.

Mr. WHITNEY. Mr. Dixon, may I just say this: This does not go to the comment. I don't think Mr. Dixon perhaps catches my point which I submit to your Honor.

2088 The COURT. This was written by Asselin.

Mr. WHITNEY. That is right. But there is no basis for Mr. Dixon saying this summarizes the discussions.

The COURT. That is right. I understand.

Mr. WHITNEY. There is no reference to this three-page memorandum in any letter by Mr. Asselin.

Mr. DIXON. Correct.

Mr. WHITNEY. This may have been Mr. Asselin's personal conception of—

The COURT. What ought to be done.

Mr. WHITNEY. Exactly.

The COURT. I understand.

Mr. WHITNEY. It may be any number of things.

The COURT. Maybe it is the sort of memorandum that he wanted to bring to a discussion.

Mr. DIXON. Exactly.

Mr. WHITNEY. Yes.

The COURT. Rather than what he carried away from a discussion.

Mr. WEBSTER. I hope we lawyers are not always bound by our notes as to what we are going to talk about or what we think may be true, because very frequently they are discarded.

Mr. WHITNEY. Your Honor, the drift of my remarks was that second only to the exhibit about Mr. Ewing which I felt we had to carry to the point of having the witness here, because he was available, if I had Mr. Asselin sitting around here, I would carry the objection this far. In other words, I think that in the case of this three-page memorandum, phrased as it is, in the light of Mr. Dixon's own proof that most of these things never did in fact happen, the materiality is so evanescent that the exhibit should be actually rejected.

Now I think we all understand here that this record is made on the basis that your Honor is not rejecting exhibits as to materiality or relevance and that you are allowing us the continuing objections as to connection and the other objections of that character. I only am taking your Honor's time because this exhibit I believe if it came up by itself and we did not have a continuing rule, your Honor would exclude it, and it is so long since we have mentioned it that I do want to mention that I think that it comes within that subject matter. If your Honor does not care to exclude it—

The COURT. No. I do not see any point to exclude it, as a practical matter. If excluding it meant that it was

physically taken out of this volume to make this volume one thousandth of a millionth of a millimeter thinner, it might be worth the effort, but it won't result in that. 2090 It will simply result in further argument at the end of the case as to why it should be included.

Mr. WHITNEY. Let us just remember then that the actual agreement that was made is Exhibit B to the du Pont answer and is in evidence in some appropriate initial under E.

The COURT. All right.

Mr. DIXON. Your Honor, I might say in reference to this discussion, and again I refer to the fact that I am still commenting on that exhibit—

The COURT. 712.

Mr. DIXON. That is right. (Continuing) That these are offered in connection with the du Pont exhibits. I mean, we have already submitted as part of this record exhibits from the du Pont files including memoranda from Mr. du Pont in connection with the Canadian situation and the relations of du Pont with CIL as well as ICI.

Now, here it is not in dispute that du Pont has a stock interest in CIL along with ICI. Here is a memorandum, for whatever value it may have, taking its part in all these exhibits dealing with the Canadian situation which relates to subjects then under discussion between the various parties involved in this litigation. At this particular time it was National Lead and the Canadian Company. We submit it for whatever value it may have in that connection.

2091 The COURT. Let us put it this way. In other words this is a memorandum, but we do not know at this time whether these are the communicated or uncommunicated cogitations of Mr. Asselin. To the extent that these comments are established by other exhibits they have merit or value or weight; to the extent that they are not, they haven't any weight. You might say it is purely surplusage, perhaps. Very likely.

2124 The COURT. No comment. Exhibit 828.

Mr. DIXON. Exhibit 828, minutes of a meeting held in 1936 in Germany, or at TG, it is of passing interest to note discussed here the fact that the Japanese engineer would not be permitted to visit the plant until the contracts had been made providing for the creation of the Japanese company.

Also, in paragraph 2 the minimum prices are referred to again.

In paragraph 5 we find a discussion and report on the Hong Kong situation previously referred to. Also, the Pinchin Johnson contract which was, as your Honor recalls, an exception to the general rule that no company should sell in the territory of the other company. And the usual clause in that contract providing for cancellation in the event of export by Pinchin Johnson was provided for.

The next Exhibit, 829, is a sales report in 1927 in which under "competition" we find reference to the activity of Laporte in the Swedish market, and that, however, any further difficulties with Laporte apparently would not arise because, as is shown here in this report, by arrangement with Laporte they have withdrawn from the markets of Titan A/S.

The next one is page 2902, Exhibit 830. It was pointed out in this exhibit, which is a market report to the international sales committee in June of 1937, that no competition is met in Belgium apart from that arising from Thann which under the agreements in chart No. 3 was allocated to that territory, and that some customers had been transferred to Thann in accordance with that agreement of the Titan companies. They do refer here, as your Honor sees, to this Dutch company that we saw develop some kind of competition in Holland shortly after and through the 1938 and 1939 period until it finally ceased operations in 1940.

2136 In Exhibit 831, page 2903, International Sales Committee, minutes of a meeting in June 1937, further reference is had in paragraph 33—and I might add that these are excerpts taken from these reports, that the full report is in evidence as part of the official record, but these are the parts that we are directing to your Honor's attention—to reports concerning production in the United States.

On page 2905 it is proposed that actual sales information or statistics on imports and exports be furnished the Paris office by the various companies. Mr. Edgerly of TP points out on page 2906 that it is rather difficult in the United States to trace delivery of their competitors. And Thompson points out that with regard to Laporte, it is not impossible that there could be one or more customers untraced, but that it was highly improbable. In other words, we have had occasion to see in the Zirconium exhibits, for example, that inquiry was directed there with reference to certain small exports, and that is undoubtedly what Mr. Edgerly is referring to.

Prices were also discussed at this meeting, and in view of the discussion, page 2907, it was found not necessary to reduce prices at the present time. However, with regard to export prices, there is no urgent need for
2127 a price reduction except occasionally in countries such as China, where they have to compete with a very cheap Japanese pigment. In other words, we find as we read these reports that the price of the product sold in these markets allocated to these companies was constantly under the control of the parties to these meetings, and that when it was deemed advisable to lower the price or to raise it, as the case might be, although that was seldom the practice based upon the policy set forth in Mr. Cornish's letter back in 1926 to expand the market as much as possible, we find that policy being followed here, but nevertheless the power, the actual fixing of that price is a matter of agreement among the various parties to this combination as far as these meetings are concerned.

It is rather interesting to read on page 2909 that with reference to the English market Mr. Thompson had said that many buyers had expressed the opinion that in adopting titanium in their formula they might place themselves in the hands of a monopoly which would be in a position to put prices up against them and that this fear had not been removed by the existence of Laporte, because, according to Mr. Thompson, the customers in England knew that there was a working arrangement
between BTP and Laporte.

2128 The policy with regard to titanated lithopone is also set forth on page 2911. It is pointed out there that that type of competition is something that would have to be—well, it was not so easy to deal with in a sense because the lithopone makers do not have between themselves marketing arrangements covering the world, as he puts it, to such an extent as we, and that there are fairly strong outsiders in the titanated lithopone market.

Exhibit 832 is a letter from Dr. Jebesen to Mr. Beschornman in December of 1937, enclosing a memorandum of the results of a discussion had in Paris in December of that year, and points out, on page 2914, that the situation in the German market as far as its territory is concerned, is such that it does not call for any price reduction at the present time. In discussing the English situation on the same page, he refers to the sales in the English market exclusive of Canada, and points out that it is the desire of Tasker and Barley to bring Laporte, as he calls it,

to their heels with a view to the quota arrangement, and the relation of prices between titanium products and lithopone is not nearly so favorable as in Germany, where lithopone is somewhat higher priced.

However, he concludes on page 2916:

"As regards the price policy for countries outside of Germany, with the exception of France and the 2129. Scandinavian countries, that that will more or less have to follow the English prices. And that is particularly true in Holland and Belgium, where this Dutch company has renewed its activities, offering at prices of 12 per cent below their prices." In other words, they will have to make an exception generally to the price structure in Holland to meet that situation, and possibly also in Scandinavia, where this new Dutch company is endeavoring to enter the market.

Exhibit 833 is the minutes of a meeting held in Frankfurt in March 1939, in which reference is made to the addition of Canada to the International collaboration. And there your Honor will recall there was some discussion in the Canadian exhibits with reference to Canada joining the International Committee and getting the benefit of the general exchange of technical information and patents which we have previously discussed in the Canadian exhibits.

Mr. WEBSTER. Mr. Dixon, it is clear that there is no mention at any place in here of prices in the United States, is there?

Mr. DIXON. No.

Mr. WEBSTER. You do not mean to indicate that there is or that any inference of that sort can be drawn.

The COURT. Mr. Dixon assents to that comment.

2308. CHARLES F. KAEGEBEHN, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination by Mr. DIXON:

Q. I will hand you what has been marked as Plaintiff's Exhibit 881 and ask if you will examine the same and state to the Court after you have examined that as to whether that was prepared by you?—A. It was.

Mr. DIXON. That is all.

The COURT. Any questions?

Mr. WHITNEY. Yes, indeed.

Cross examination by Mr. WHITNEY:

Q. Mr. Kaegelbehn, this document, Exhibit 881 is

marked "Notes re du Pont situation." For whom, if anyone, did you write those notes?—A. Dr. Jebsen.

2309 Q. Did you mail them to Dr. Jebsen?—A. No, sir.

Q. Did you hand them to Dr. Jebsen?—A. That is right.

Q. He was in America at the time?—A. He arrived two days later, on May 17th.

Mr. DIXON. If the Court please, with reference to the scope of the cross examination of the witness I object. We base our objection on that ground.

The COURT. The worst that can happen is that he becomes Mr. Whitney's witness. That won't upset me unduly. Of course I should not like him to exploit this opportunity for a completely different connection, but even that he probably could do. As long as he is addressing himself to the document before us I have no objection.

Q. Upon what was the document based?—A. A series of conversations that I had had with du Pont people during the winter of 1937-1938.

Q. And which du Pont people?—A. Particularly Mr. Rupprecht.

Mr. DIXON. May it please the Court, I don't want to interrupt except for the purpose of submitting to your Honor a memorandum on this question which may arise further and I would like to submit it to the Court at this time (handing).

Mr. WHITNEY. What do you mean by "this question"?

Mr. DIXON. Scope of the cross examination.

2310 Mr. WHITNEY. I think I will withdraw the objection. Your Honor said "Go ahead"?

(Witness excused.)

2319 Mr. DIXON. Exhibit 882 is an outline of the procedure for granting licenses under the du Pont-Titan prospective arrangement which is dated June 1, and it is pointed out that the licenses by Titan to du Pont under the patents owned by Titan are subject only to the consent of National Lead and that the sub-licenses by Titan to du Pont under patents of its associates, there the consent of National would also be required.

Mr. WEBSTER. No comment.

Mr. WHITNEY. I still do not understand whether Mr. Dixon is saying that this describes existing agreements or is an idea in the mind of the author as to what might
2320 be an appropriate thing in future agreements, but there is no doubt that it should be the latter.

The COURT. It manifestly is. Exhibit 883.

Mr. DIXON. This, your Honor, is a memorandum dictated by Dr. Jebsen—

Mr. WHITNEY. Just a moment. It is not at all.

Mr. DIXON. I appreciate Mr. Whitney's comments, but here again I rise to state that the exhibit itself indicates—

Mr. WHITNEY. You better not state until we look at it. We have an exhibit in which notes are made and it does not have any word "Jebson" on it. I object to that on the ground of competence.

Mr. DIXON. May I finish? What I started out to say, your Honor, was that this exhibit says on its face, although the printer—

Mr. WHITNEY. I object to comments. The exhibit can be marked for identification and handed to the Court.

The COURT. Has this been marked in evidence?

Mr. DIXON. It has, your Honor, and under the ruling—

The COURT. The proper motion now is to strike.

Mr. WHITNEY. Reserving all the other grounds of motion which your Honor has for me continuing, because the understanding was they were to be reserved to the end of 2321 the case—

The COURT. Certainly..

Mr. WHITNEY. I now make a motion to strike this Exhibit 883 on the ground that it is incompetent because it is an unsigned memorandum.

The COURT. All right. I will look at it.

(Document handed to the Court.)

Mr. DIXON. We had better submit a clearer copy because I doubt very much whether you could read that under the ruling.

Mr. Whitney is quite right in objecting to it as an unsigned document. I am merely here to state that it is not unsigned in the sense that there are notes thereon which indicate the source of the document and which will fully explain it.

The COURT. Are you producing the original?

Mr. DIXON. We will have to go to our files to get it unless the National has a little better copy.

Mr. WHITNEY. As Mr. Dixon has made a remark about the face of the exhibit, I will supplement it by the remark that what I can read begins "Memo on the principles to govern relations between du Pont and Titan" and as I explained to your Honor, before I would raise objections of competence in cases in which I thought the ground of competence was sound, and in addition thought that the 2322 exhibit was unreliable, because this is a mere expression by whoever wrote it of what he thought ought to govern somebody in the future.

The COURT. That is true, but if it is a statement by Dr.

Jebsen of his state of mind it may be, and probably will, throw light upon his intention in doing certain things which are done, because this is simply a reflection of his cogitation and does not pretend to be anything more than that.

Mr. WHITNEY. Well, your Honor, on principle I do not like to be prejudiced by the remarks of gentlemen not associated with us except in cases in which I have to be for the convenience of the trial.

The COURT. I don't want you to forego any proper objection that you may have.

Mr. WHITNEY. I think that 98 per cent of the evidence that has come in is irrelevant and immaterial. I think that the trial has been unduly prolonged; that a fearful expense has been cast upon my client, running into many thousands of dollars because the Government has chosen to cast in this mass of stuff—

Mr. DIXON. Just a minute.

Mr. WHITNEY. That is why I am objecting.

The COURT. You don't have to argue that.

Mr. WHITNEY. All right, your Honor.

2323 The COURT. No ruling is required on the application. Have you the original?

Mr. DIXON. This is still not the original, but it is the best we can get.

The COURT. I understand I am dealing with a document marked by the clerk.

Mr. DIXON. This is the one that is marked in evidence (exhibiting). It is the same thing. Your Honor has our photostat from which the one in evidence was marked, which is the best one we have.

The COURT. I still cannot read it.

Mr. WEBSTER. May we have a recess for just two minutes?

The COURT. All right. Two-minute recess.

(Short recess.)

Mr. WHITNEY. Mr. Webster says he has a copy with the writing legible. He just discovered it this minute.

Mr. WEBSTER. We have here the grandfather of all the copies that have been produced here this morning.

The COURT. Can I look at it as an aid to read this photostat?

Mr. WEBSTER. Yes, sir, I was just about to hand this to the clerk. This is the copy with the initials at the foot of the antitrust representative, Mr. Murphy, who extracted

the document from the Lead Company files and
2324 made the original negative from which all the illegible positives and negatives were made since

[handing to the Court].

The COURT. Well, did the pencilled note appear on it at the time it was taken out of your file?

Mr. WEBSTER. It did.

The COURT. Has Mr. Whitney seen it?

Mr. DIXON. I have not seen this one, your Honor. All we have is the photostat but we know what the writing is.

The COURT. I take it then that National admits the genuineness and authenticity of this document as a statement by Dr. Jebson? Is that correct?

Mr. WHITNEY. No. That is not what appears.

The COURT. Doesn't it say this was prepared by Dr. Jebson?

Mr. WHITNEY. No. The note does not say that.

The COURT. What does it say?

Mr. WHITNEY. It says "This memorandum dictated by Dr. Jebson June 1938, prior to June 8, 1938, but not brought forward."

The COURT. What does that mean? Does National admit this memorandum was dictated by Dr. Jebson?

Mr. WEBSTER. Yes, and that the note was made by Mr. Kaegebehn.

Mr. WHITNEY. Will Mr. Kaegebehn tell us what 2325 "not brought forward" means?

The COURT. We may go into that in a moment and maybe we can explore that, but for the present we have it that this paper was dictated by Dr. Jebson. Now of course under our stipulation that does not bind du Pont. Am I correct on that? So you can still have an objection to that document.

Mr. WHITNEY. Well, your Honor, I think your Honor will agree at once that we only have what your Honor quoted in company with the statement "but not brought forward."

The COURT. All right. Call Mr. Kaegebehn back to the stand.

Mr. WEBSTER. I think that is the solution and I hoped the Government would do that.

CHARLES F. KAEGBEHN, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct examination by Mr. DIXON:

Q. You made the pencilled notations contained on the document Plaintiff's Exhibit 883, Mr. Kaegebehn?—A. I did.

Q. Will you explain to the Court what the words "not brought forward" mean on that exhibit?—A. Dr. Jebesen dictated these notes to me and I redictated them to my secretary and they were typed in my office. It was 2326 proposed that they would constitute the statement of principles which Dr. Jebesen proposed to bring forward in conferences to be had subsequently with representatives of the du Ponts, but he did not bring this forward; that is to say, he did not submit this.

The COURT. The memorandum to the gentlemen representing du Pont?

The WITNESS. That is right.

The COURT. Can you say that that is an accurate transcription of what Dr. Jebesen dictated?

The WITNESS. Yes, sir.

The COURT. Very well.

Mr. DIXON. That is all.

Your Honor, I think we should have the record show the language contained upon this document.

The COURT. All right. You may read it into the record.

Mr. DIXON (reading). "This memo dictated by Dr. Jebesen June 1938," (with an arrow pointing to "prior to June 8, 1938") "but not brought forward."

Mr. WHITNEY. That should be deemed to appear on page 3047?

The COURT. Correct, as a superscription.

Mr. WHITNEY. Right, your Honor. Then we have no further objection on the ground of competence.

2342 Mr. DIXON. Exhibit 887 is a memorandum regarding the understanding between the du Pont, Titan and National Lead companies and covers conferences, or a conference had on June 8th.

Mr. WHITNEY. Will you pardon me, Mr. Dixon? 2343 I have an objection here. I do not want to hold this up now that we have worked out ways of clarifying these things, but beginning at page 3056, the exhibit marked 887, is something which contains on 3056 the words "Memo to Understand."

Mr. DIXON. That is "Memo re Understanding."

Mr. WHITNEY. It contains at page 3059 the phrase "Memo re Handling of Licenses" and so forth, and contains annexes at 3061 and 3062 respectively, and in capital letters at 3063 another word "Memorandum", and I am afraid we must have further clarification before we can avoid presenting our objection.

The COURT. Mr. Kaegebehn's initials were at the end of the whole thing?

MR. WHITNEY. I don't know, your Honor. They were at the end of something.

THE COURT. All right.

MR. DIXON. Mr. Kaegebehn, will you give us the pleasure of your presence on the stand for a moment?

CHARLES F. KAEGBEHN, recalled.

Direct examination by Mr. Dixon:

Q. I hand you what has been marked Plaintiff's Exhibit 887 and ask you if that exhibit bears your initials at the end thereof?

2344 MR. WHITNEY. May I see that paper?

MR. DIXON. Yes [handing].

MR. WHITNEY. If your Honor please, one cannot lift one's self by one's bootstraps. Each one of the five points I picked out begins a separate page.

THE COURT. The simple question asked Mr. Kaegebehn is whether he is the author of each and every one of this collection of papers.

Q. Will you answer the question as the Judge put it to you, Mr. Kaegebehn?—A. I would say, sir, I am the sole author of the memorandum which in the printed record begins on page 3063.

By the Court:

Q. What about the preceding documents?—A. Now there is joint authorship between Dr. Jebson and myself.

Q. But did you have a hand in each one of these memoranda?—A. Yes, sir.

Q. And you saw the final text of each one?—A. They were prepared in my office.

Q. And then you stapled the several memoranda together?—A. That is correct. They were not stapled; they have a Gem clip.

MR. WHITNEY. They were prepared by Dr. Jebson and yourself?

THE COURT. Doctor Jebson and Mr. Kaegebehn, 2344a down to the middle of page 3063, and by Mr.

Kaegebehn evidently from 3063 to the end of 3064. Is that correct?

THE WITNESS. Yes, sir.

Q. And when did you prepare that?—A. On our return from Wilmington the following day; that is to say, on June 9th.

Q. All of these were prepared on one day?—A. Yes, sir.

Mr. Dixon. That is all.

2345 Cross-examination by Mr. WHITNEY:

Q. Mr. Webster says that after you and Dr. Jebesen had cooperated, the last memorandum was intended to represent your own memory of the conference of June 8th. Is that correct?—A. It was my memory of the conference of June 8th but constituted an acceptance by Dr. Jebesen inasmuch as it was a working resume of this conference we had in Wilmington on the preceding day.

Q. Did Dr. Jebesen see the last memorandum on page 3063?—A. Yes, sir.

Q. Was it a complete resume of everything said at Wilmington?

Mr. Dixon. I object to that question.

The Court. I will allow it.

A. To the best of my recollection it covers our conversations at Wilmington.

Q. Was anything said at Wilmington on the subject of territorial limitation?

Mr. Dixon. I object to that, your Honor.

Mr. Whitney. On what ground? That it is not material to the question in the case?

The Court. Overruled.

A. I believe there was.

Q. What was said to the best of your memory as to substance?—A. I think Mr. Rupprecht told us not to worry about those things.

Q. Was that in answer to an inquiry from you or Dr. Jebesen?—A. I should think it was in answer to an inquiry of Dr. Jebesen.

Q. Can you remember the substance of Dr. Jebesen's inquiry?—A. I would not attempt to quote him on it.

Q. And the extent of your recollection would be that Mr. Rupprecht said not to worry about that subject?—A. Gave us a reassuring reply.

Q. Did he say something to the effect that it was not the intention of du Pont to sell abroad?—A. I do not recall that he mentioned that at that time.

Q. Did he say something to the effect that you could take it that he was agreeing with you on behalf of du Pont not to sell abroad?—A. I could not say that, sir.

Q. Were any of these papers handed or delivered or mailed to Rupprecht or anyone else in du Pont?—A. No, sir.

Q. Were any of these papers discussed at a meeting

with Rupprecht or anyone else of du Pont after they were written?—A. Not to my knowledge.

Q. When Rupprecht gave you reassurance, or said you were not to worry about du Pont selling in Europe, did he give you any reason as to why you should not 2347 worry?—A. I do not recall that he gave us any reason at that time. I think he had previously stated reasons to me.

Mr. Dixon. If the Court please, I object. I think we are getting now away from the memorandum.

The Court. Yes, but he may go away from the memorandum.

Q. Had that expressor been during the preceding winter?—A. To the best of my recollection, yes.

Q. There is in evidence a memorandum written by you of May 15, 1938, containing this phrase: "They will not make commitments with respect to unpatented territories, the reason given being the antitrust laws," and also containing this phrase—

Mr. Dixon. If the Court please, I do wish to object to the scope of the cross-examination. I think as far as this document is concerned it ought to be confined to this document. Otherwise we will be opening up perhaps all the documents already in evidence, and I make my objection on the ground that the cross-examination should be confined within reasonable limits, and the scope of the cross-examination now entered into by this question certainly does not relate to this memorandum.

The Court. Well, there is nothing sacred about 2348 this memorandum. This happens to be a document which you did not prove in the summary fashion but which you produced the witness to prove and he has proved it. Now he is under cross-examination. Mr. Whitney has the right to cross-examine him as to his observational opportunity when he made the memorandum, as to inconsistencies in other contemporaneous memoranda in order to impeach this memorandum; he may examine him with respect to his capacity to put down in the English language that which he heard or saw; he may impeach his credibility. So you have it three ways. Objection overruled.

Q. (Continuing):—and in that memorandum of May 15, Exhibit 881, Mr. Kaegelbehn, you add: "du Pont cannot undertake any commitment with respect to the exportation of finished articles by its customers as, for example, is provided in the Agreement of 1920, the reason

for this attitude is the antitrust laws." Have you anything now that you can add as to what Mr. Rupprecht said other than what I have read from the exhibit?—A. I would like to have the question reread. I don't know whether you read from one part or two parts.

The COURT. The reporter will restate the question. (Question read as follows:

"Q. There is in evidence a memorandum written 2349 by you of May 15, 1938, containing this phrase: 'They will not make commitments with respect to unpatented territories, the reason given being the antitrust laws,' and also containing this phrase: 'du Pont cannot undertake any commitment with respect to the exportation of finished articles by its customers as, for example, is provided in the Agreement of 1920, the reason for this attitude is the antitrust laws.' Have you anything now that you can add as to what Mr. Rupprecht said other than what I have read from the exhibit?")—A. Nothing to add.

Mr. WHITNEY. That is all.

Redirect examination by Mr. DIXON:

Q. I believe this memorandum, you testified, Mr. Kaegbehn, was made the day after you returned from this conference in Wilmington? A. That is the memorandum beginning—

Q. This exhibit we are now discussing, 887, the one that we originally asked about when you took the stand a few moments ago. —A. That is correct.

Q. And it correctly represented, did it not, your understanding of what occurred at that conference at the time you put these understandings down in writing with Dr. Jepsen in this Exhibit 887?—A. The memorandum that begins on the page 3063—

2350 Q. No.—

Mr. WHITNEY. Just let him finish.

Mr. DIXON. I would like to have him answer my question yes or no.

The COURT. The reporter will restate the question.

Q. (Question read.)

The COURT. Does it or doesn't it?

Mr. WHITNEY. May I say a word?

The COURT. Surely.

Mr. WHITNEY. We are not trying a murder case. We are trying an antitrust case in which we are now on page 3056 of the Government's papers. We have here the wit-

ness who has written a large part of it. Now I took a big chance. I asked this witness about the heart and soul and substance of this case, and I submit to your Honor sitting here in this court of equity on the twentieth day of the trial that the first and only witness the Government has ever put on the stand ought to be allowed to testify as he likes in his own way in answer to counsel's questions as to what is the sum and substance of the critical meeting as reflected in his memorandum, and not forced to answer yes or no.

The COURT. I will let him do both. Meanwhile the question is, and it is unexceptionable, does it or
2351 doesn't it reflect your understanding of what was agreed or what you heard in Wilmington at the conference?

The WITNESS. To answer either yes or no, sir, I think requires some explanation.

The COURT. The answer is, you cannot answer it that way?

The WITNESS. That is correct.

The COURT. Do you want him to explain?

Mr. DIXON. I would like to ask another question.

Mr. WHITNEY. May I respectfully submit that under the circumstances I have given, this trial in equity, under all these circumstances, the witness ought to be allowed to explain when counsel asks a question right then and there.

The COURT. Of course he will be allowed to explain. The only question is whether he should do so on Mr. Dixon's time or Mr. Whitney's.

Mr. WHITNEY. Oh, but, your Honor, we are both under the rules entitled to cross-examine. Here is an adverse witness to both of us. He is an adverse witness to Mr. Dixon and he is an adverse witness to me, but he is Mr. Dixon's witness. Now it will be like the strict rules of the common law evidence if we have to go back and forth.

The COURT. We will cut the Gordian knot.
2352 What explanation do you want to offer?

None of you are now bound by the question.

The WITNESS. It contains what was agreed to, not only on June 8th at Wilmington, but on June 3rd in New York. It also contains some expressions of how Dr. Jebson and I expected or hoped that this cooperation which we believed had now developed with du Pont and Titan, Inc. would work.

The COURT. Very well. Is everybody content?

Mr. DIXON. It satisfies me, your Honor.

The COURT. Are there any further questions?

2353 Re-cross examination by Mr. WHITNEY:

Q. Do the first two paragraphs at page 3056 fall within the class of what you and Dr. Jebesen hoped for?

—A. No, sir, they do not.

Q. What do they represent?—A. Paragraph 1 is a statement of Titan Company's operations as set forth in its agreements, particularly the agreement of 1920. The second paragraph is what we had understood was du Pont's operations, as limited by their agreement with us of 1933, particularly the field of sale therein expressed.

Q. Now the second part of that second paragraph contains this statement: "and they"—being du Pont—"will endeavor to prevent that products within the Licensed Field are exported except as constituents of bona fide manufactured articles."

What if anything was said on that subject as between Mr. Rupprecht, Dr. Jebesen and yourself on June 3rd or June 8th?—A. Mr. Rupprecht's attitude with respect to that is set forth in my memorandum of May 15th.

Redirect examination by Mr. DIXON:

Q. These first two paragraphs of this memorandum, Mr. Kaegobehn, were those prepared by you or Dr. Jebesen?—A. I can't distinguish between the authorship in that finding.

Q. Does this memorandum represent an accurate transcription of your best recollection of what occurred at
2354 that conference in Wilmington on June 8th?—

Mr. WHITNEY. That is objected to as duplication of the question that has already been asked and answered in the same form.

The COURT. Yes, I think so. I think it has been answered.

Q. Now, who was present at that conference, Mr. Kaegobehn, apart from yourself and Dr. Jebesen?—A. At Wilmington?

Q. Yes.—A. Mr. Rupprecht and Mr. Hancock.

Q. Was anyone else there?—A. Not during the period when we considered these matters. There was a subsequent luncheon, but nothing of a business nature was discussed at that luncheon.

Q. Were there any other conferences had to your knowledge between Dr. Jebesen and Mr. Rupprecht?—A. Yes.

Q. When were those other conferences held?—A. There was on on June 3, 1938.

Q. You were not present at that conference, were you?—A. Yes, I was.

Q. That was the one in Mr. Rockwell's office?—A. That is right.

Q. Were there any other conferences that you know of between Dr. Jebesen and Mr. Rupprecht at which you were not present?—A. Not during this visit of Dr. Jebesen's to the United States.

2355 Q. That is, in June of 1938?—A. He arrived in May 1938.

Q. Was that the first conference that was had with Mr. Rupprecht and Dr. Jebesen, namely, the one on June 3rd?—A. To the best of my knowledge, yes.

Q. Would you say there were no other conferences had between Dr. Jebesen and Mr. Rupprecht?—A. I would say that if there were, I should have known about them, and I didn't know of any.

Q. So, to the best of your knowledge, the only conferences were those of June 3rd and June 8th?—A. To the best of my knowledge.

Q. Were there any thereafter?—A. Not to my knowledge.

Q. Well now, these first two paragraphs in which the operations of du Pont are referred to; did you ever have any discussions particularly with reference to the second paragraph of this memorandum with Mr. Rupprecht?—A. Yes, I did.

Q. When?—A. During the winter of 1937 and 1938.

Q. And Dr. Jebesen of course was not present at that time—A. No, sir.

Q. And at that time was it stated by Mr. Rupprecht that the operation of du Pont with reference to the manufacture of titanium pigments and the sale thereof would be confined to the United States, Central and South
2356 America?—A. As regards the sale, it is my recollection that Mr. Rupprecht represented that the agreement of 1933 prevented them from selling outside of the territory therein specified.

Q. In other words, that was the territorial limitation recognized by the du Pont Company; is that correct?

Mr. WHITEN: I object to that, your Honor.

The COURT. Objection sustained.

Q. Now, did you have any other discussions with Mr. Rupprecht with reference to paragraph 2 at any other

time, Mr. Kaegebehn?—A. It is my recollection that I discussed this matter or the general idea of a license agreement, a general agreement, between du Pont and Titan, Inc. about four times during that winter. The result of those conversations is embodied in that memorandum of May 15th.

The COURT: Which exhibit is that?

The WITNESS. 881.

Q. Now this memorandum of understanding between du Pont, Titan and National Lead which you made on June 9th after you returned from the meeting with the du Pont men at Wilmington, does that represent in toto—I mean beginning with the first portion of this exhibit and ending with the last portion thereof, does that represent your understanding of the understanding arrived at with the du Pont people in Wilmington after your meeting 2357 of June 8th?—A. It includes that, but it goes beyond it.

Q. Now in what sense does it purport to go beyond that understanding, Mr. Kaegebehn?—A. I can give you an instance of that in the—

Q. Will you so state to the Court such an instance?—A. Yes. The "Annex Concerning Exchange of Technical Information" which begins on page 3061 sets out a rule, if you wish, by which this contemplated exchange of technical information between du Pont and Titan, Inc. should be carried out. Now I know that that was not discussed with du Pont.

By the COURT:

Q. This was your analysis of what you understood the agreement to imply?—A. It was that, sir, and in addition it was the application of the same principles that applied between National and du Pont.

Q. In any event, what you contributed out of your mind which you thought was consistent with what was agreed to on June 8th; is that what you want to tell me?—A. Yes, sir.

By Mr. Dixon:

Q. Were there any other respects, Mr. Kaegebehn, in which this exhibit might differ from any understanding that you carried away with you concerning the understanding between du Pont and Titan after this conference in Wilmington on June 8th?—A. It is difficult to point out

each single instance without going through each
2338 page, but I do think that in the second paragraph
the statement that du Pont would endeavor to pre-
vent their products from being exported goes beyond any-
thing that they said to us.

Q. Well, was that inserted there just out of your mind,
Mr. Kaegebehn? Just how did you get any notion that
there might be any possibility of that happened before
you reduced it to writing in this memorandum?—A. I
should say that that is the result of Dr. Jebesen's and my
discussions, put down more or less for his guidance.

Q. Well, this purports to be a memorandum of the un-
derstanding reached between you—

Mr. WEBSTER. It doesn't say that. It says "Memo-
randum re understanding." It doesn't say "Memorandum
of understanding."

Mr. DIXON. Just let me ask my question, please.

Q. This purports to be, does it not, Mr. Kaegebehn, a
memorandum, or a memo as it is called, re the understand-
ing between du Pont, Titan and National Lead Company,
doesn't it?—A. That is correct.

Mr. WHITNEY. I object to that upon the ground that it
shows on this face what it purports to be. Counsel has
slipped in the word "the". It says "Memorandum re
understanding", not "Memorandum re the understand-
ing."

The COURT. Yes.

Mr. DIXON. I believe he answered the question
2359 that it does.

The COURT. I think so. Go ahead.

Mr. WHITNEY. I objected to the question.

The COURT. Manifestly, this witness can't tell us what
this instrument purports to be.

Mr. WHITNEY. Precisely.

Q. In other words, Mr. Kaegebehn, when you got back
from this conference what you put down in this memo-
randum, with the exception of your testimony with refer-
ence to this "annex" portion of the exhibit, was a tran-
script in a sense of what understanding was reached at
the conference at Wilmington between the parties at that
conference; isn't that a fact?—A. No, sir.

Q. Well, in what respects, then; did you put down on
paper something that did not occur at that meeting apart
from what you have already stated?—A. What occurred
at that meeting is set forth in my memorandum beginning
at page 3063.

Q. Well, that is what you put down, is it?—A. That is correct. Now what is included in pages 3056 to 3063 represents what ground had been covered in two conferences, the first of June 3rd, the second of June 8th, plus how Dr. Jebson particularly and I secondarily considered that this coöperation might work out.

Q. And if that was your understanding, presumably the du Pont people attending that conference had the similar understanding when you left; is that not so?

Mr. WEBSTER. I object to this as argumentative.

The COURT. Objection sustained.

Q. Were you in accord, Mr. Kaegebehn, when you left that meeting?

Mr. WHITNEY. Was he what?

Mr. DIXON. In accord.

Q. (Continuing) Was there any disagreement between Dr. Jebson and Mr. Rupprecht after you left the meeting in Wilmington?—A. I don't know what was in the mind of Dr. Jebson.

Q. No. I am just asking you, were you in accord? Were there any disagreements or unsolved questions that were still in the air after you left that meeting?—A. They left in a very friendly way, I should say.

Q. That is what I wanted to know. On page 3058 of this memorandum the following language appears: "The above principles of understanding have been reached between Mr. Rupprecht and Dr. Jebson, with a reservation by Dr. Jebson that they are subject to approval" of the "associated companies."

Now that actually happened at that meeting, didn't it?—

A. In the sense that each of these things set forth preceding that language was taken up and agreed to, I can't say yes. I can say that the statement as contained here preceding that language was presumably what Dr. Jebson and I considered had been agreed to by Mr. Rupprecht and Dr. Jebson.

Q. At that meeting in Wilmington?—A. No, sir,—

Q. Well, at the last meeting— A. —as the result of their conversations.

Mr. WEBSTER. I must object. I am not taking any active part in this because I think Mr. Kaegebehn is a competent and honest witness, but I do think that he should be given the opportunity to finish his answer before Mr. Dixon interrupts him.

The COURT. His last answer was "No, sir." That is a

very complete answer. In fact, I don't know anything that you can add to make that more complete; anything you add to that tends to qualify.

Q. I am turning to page 3058. Do you have that before you, Mr. Kaegebehn?—A. Yes.

Q. You will find at the bottom of that page: "The above principles of understanding have been reached between Mr. Rupprecht and Dr. Jebesen".

Is that a correct statement in this memorandum, Mr. Kaegebehn?—A. It is a correct statement as to what Dr. Jebesen and I had in our minds.

Q. As to what your impressions were of the agreement arrived at at the conferences in Wilmington; is that correct?—A. That is correct.

Mr. Dixon. That is all.

Recross examination by Mr. Whitney:

Q. Now, Mr. Kaegebehn, just lay aside the book and let us look at the exhibit itself if you will, kindly. It begins with four pages, three or four pages, and on page 1—

Mr. Whitney. I show it to his Honor first.

Q. —in the middle it says: "Licensed Field Notes: Mr. K. will specify this."

The Court. And the handwritten words "see annexed." There is an annex to that.

Mr. Whitney. Yes, your Honor.

The Court. Go ahead.

Q. Do you see that?—A. Right.

Q. At the bottom of page 3 you see: "The above principles of understanding"?—A. Yes.

Q. Now does that refresh your recollection as to who wrote the first three pages?—A. I haven't any doubt about that, Mr. Whitney.

Q. Well, who did?—A. I said that the first three pages were the joint authorship of Dr. Jebesen and myself.

Q. Who dictated the top two paragraphs; who commenced the dictation preceding the phrase "Mr. K. will specify this"?—A. As I recall this conference, Dr.

Jebesen conducted the dictation and I took it down in notes from his dictation, making such contributions as he would question me about or I would volunteer.

Q. Did he request you or did you volunteer a contribution in respect of the second paragraph?—A. I don't recall.

Q. Now you testified in answer to a question of Mr. Dixon's that Mr. Rupprecht had told you during the winter that his agreement of 1933 prevented du Pont from

selling outside of North America, Central or South America.—A. Yes, sir.

Q. Can you remember whether in words or substance Mr. Rupperecht stated whether that was a written agreement or an oral agreement?—A. Why, he would refer to the agreement of January 1, 1933, between Titanium Pigment Company and Krebs.

Q. The written agreement?—A. Yes, sir.

Q. Because there is no mystery between his Honor and Mr. Dixon and me about the fact that that is different from the second paragraph, where it doesn't say that Mr. Rupperecht is prevented, but it says: Mr. Rupperecht will endeavor to prevent that products within the field are exported.—A. That is correct.

Q. Now, did Dr. Jebesen at the meeting on June 8th in Wilmington say anything in words or substance to Mr.

Rupperecht to the effect that Mr. Rupperecht had orally agreed in 1933 to prevent exports outside of North or Central or South America?—A. No, sir, not that I remember.

Q. Did Dr. Jebesen tax him with it? Did he go after him and say, "You and I have an agreement that you will prevent exports to those countries"?—A. I don't recall that.

Q. You say you do not recall any such happening?—A. That is right.

Q. The meeting was before the luncheon, was it?—A. That is right.

Q. Did you meet again after the lunch?—A. No, sir.

Q. Then when you said that the meeting broke up in a friendly way, you were referring to the feeling between the parties, were you not?—A. That is right.

Q. Now taking again the book, page 3056, it says at the middle of that page: "D's pigment division will give licenses to manufacture, use and sell to T. Co., Inc. at T. Co., Inc.'s request for the territories in which T. Co., Inc. operates with the exception of Central and South America."

Referring to that phrase, that I take it we would all agree is to be taken as not confined to T. Co., Inc. but to all the foreign associates?—A. I think it should be taken as meaning that du Pont will give licenses to Titan, Inc. with the right to sub-license its foreign associates.

Q. Now, did Mr. Rupperecht say anything in words or substance to the effect that du Pont would give such a license, referring to countries other than those

in which du Pont had patents applied for?—A. No, sir, at no time.

Q. Turning to the next page, there is at the top the first specific quotation of Mr. Rupprecht: "Mr. Rupprecht declared that du Pont's Pigment Division dealt with all pigment matters of du Pont."

Mr. Rupprecht did so declare, did he not?—A. It is my recollection that he did.

Q. And on the next page, at the top, the third line, it says that: "Mr. Rupprecht expressed the view that the reservation pertaining to du Pont's patent rights in the territories of T. Co., Inc. was of a formal nature and will have no particular importance."

Do you remember those words?—A. I don't remember those exact words but I do recall that Mr. Rupprecht said something to that effect.

Q. Did he say in that connection what he meant by there being no particular importance to the reservation?—A. I don't recall whether he explained it at that time or not, but he had at other times, if not then, told me what he meant in connection with that.

Q. And what was that?—A. Mr. Rupprecht would represent that this reservation was of no practical importance because of the economic conditions preventing du Pont from taking commercial advantage of it.

2366 Q. Now reverting to the second paragraph on page 3056, will you look at Dr. Jebson's own memorandum on page 3047, the third paragraph?

Mr. WHITNEY. For his Honor I will read that. Dr. Jebson wrote:

"DuPont will operate in the United States, Central and South America only and will endeavor to prevent that their products in the Licensed Field are exported except as constituents of bona fide manufactured articles."

Q. (Continued) Now, that was not brought forth on June 8th, was it?—A. No, sir.

Q. Now reverting to the second paragraph on page 3056, which reads:

"D's operations as regards manufacture and sale will be in the United States, Central and South America only and they will endeavor to prevent that products within the Licensed Field are exported except as constituents of bona fide manufactured articles."

Does that in any way refresh your recollection as to who dictated the second paragraph?—A. I believe I testified that Dr. Jebson dictated both of those, as I recall it now.

By the Court:

Q. Do you know whether Dr. Jebesen had his memorandum in his pocket when he went down to Wilmington?—A. I think he did, sir. He took quite a few papers.

Q. Was the discussion casual and fugitive in character or did you go point by point?—A. It was more casual, sir, than going point by point. You see, Dr. Jebesen had gone over a considerable part of the subject at the conference of June 3rd, so there remained some loose ends to consider.

By Mr. Whitney:

Q. This memorandum was dated June 9th. How long did Dr. Jebesen remain in America after that?—A. Not very long, sir. I could not give you the date, but my recollection is that he left shortly thereafter.

By the Court:

Q. Did Mr. Rupperecht make any notes during the conference?—A. No, sir.

Q. Did Dr. Jebesen?—A. None of us did, as I recall it.

Q. Did Dr. Jebesen tell Mr. Rupperecht that he was going back to his office to make a record of what he understood the understanding was?—A. No, sir.

Q. Mr. Rupperecht did not say anything of the kind either?—A. That is right.

Q. Was anything said as to whether the matter should remain unwritten?—A. Not there as I recall it; it was generally understood that we did not want to reduce too much of our conversations exhaustively.

The Court. All right.

Mr. Whitney. I did not hear the last word, after "too much of our conversation."

The Witness. Exhaustively.

Mr. Whitney. I move to strike out the part about "it was generally understood."

The Court. I will grant your motion.

Mr. Whitney. But I don't want to hide it.

The Court. Do you want to strike it out?

Mr. Whitney. I don't want to hide the subject matter, but I want to elicit it by asking him—

The Court. I will grant your motion.

By Mr. Whitney:

Q. What do you recall being said in substance on the subject of not reducing it to writing?—A. I recall Mr.

Rupprecht cautioning me not to keep any notes on my conferences during 1937 and 1938.

Q. Did he give you any reason?—A. I don't know that he did.

By the COURT:

Q. Will you look at page 3058, the sixth line.

"If D felt itself able to make a written general agreement"

was that said in connection with the general problem of reducing the understanding to writing, or did it refer to some other subject?—A. You see, sir, the idea that Titan, Inc., and du Pont might possibly enter in a general agreement providing for the exchange of licenses was not fully abandoned until the conference of June 3, 1938, wherein Mr. Rupprecht stated that if we could make a general agreement—so, that statement I take it refers to the fact that du Pont as reported by Dr. Jebson in his memo of June 3rd stated that they could not—

Q. Make a written agreement?—A. A written general agreement.

Q. Did he say "written" or did he say "general"? Which is it?—A. Both, sir.

Q. He said both?—A. Written general agreement.

By Mr. WHITNEY:

Q. When did he say that?—A. At the conference of June 3, 1938, as reported in the memo, Mr. Rupprecht informed us for the first time of the impossibility of entering into any general written agreement, that is, an agreement between Titan, Inc. and du Pont.

Q. You say as reflected in the— A. My conversations during the winter were all directed towards ascertaining a basis for a general written agreement between du Pont and Titan, Inc.

Q. You say as that was reflected in the memo. By 2370 that do you refer to Exhibit 884 at page 3049?—A. That is correct.

Q. Do you refer, for example, to the middle of page 3050?

"Rupprecht wanted to make it clearly understood that exchange of licenses was limited", etc.?

A. No.

Q. What do you refer to in the "Memo"?—A. On the top of page 3050 "Rupprecht answered that it had been du Pont's policy for their own reasons to make this reser-

vation, but he considered that if an agreement could be made today"—

Q. That is, if a general agreement "could be made today"?—A. That is right.

Q. And what did he assign, if any, as a reason that a general agreement could not be made today?—A. The reluctance of their legal department to sanction such a general agreement at that time.

Q. But he did say, did he, that they were perfectly willing to make an oral agreement?—A. No, sir, I don't think he said that. No, I don't remember him saying that.

Q. In other words, in your answer to his Honor about a written general agreement you were not answering "Yes"

to the word "written" as opposed to the word
2371 "oral"?—A. That is correct, sir.

By the Court:

Q. I was addressing your attention to the word "written" as opposed to the word "oral." That was precisely the purpose of my question.—A. I see. But—

Mr. WHITNEY. Of course he is not of our profession, your Honor.

The Court. He is doing all right.

Mr. WHITNEY. One believes that he won't presume to interpret the decisions of the Court, in which perhaps we can envy him, but precise words come slowly.

Q. Did Rupprecht say that he didn't want to make a written agreement?—A. Yes; he said that he couldn't enter into a general written agreement.

Q. Because his legal department won't sanction it?—A. That is right.

Q. Did he indicate to you and did the conference of June 3rd and June 8th follow thereupon because he was willing to reach an informal oral understanding?—A. He did not indicate that he would reach any informal oral understanding embodying the conditions of a written agreement as a substitute for the written agreement. He was ready to discuss how far he would go and on what basis he would go with Titan Company, Inc.

Q. But that he wanted it left in an oral state?—A. Yes.

2372 Q. And when you left the meeting on June 8th was it your personal understanding that you had reached an understanding?—A. We had reached an understanding as far as—

Q. As far as it went.—A. That is correct.

Q. And did Rupprecht say anything which would indicate to you that he understood that he had reached an understanding?—A. Oh, yes.

Q. So that if the following day Rupprecht did something which was contradictory of what had been said on June 8th you would have felt free to call him up and say "How come"?—A. That is right.

By Mr. WHITNEY:

Q. Is the oral understanding to which you refer embraced within the subject matter which follows your phraseology on page 3063:

"The following is a resume of the remarks of Mr. C. H. Rupprecht":

or was there something additional that he orally agreed to?—A. What follows is embraced within the understanding and something additional, namely, what was agreed upon at the conference of June 3rd plus what Mr. Rupprecht told me was the extent that du Pont could go or would go,

Q. All right. Are you saying that in addition to what is in the memorandum beginning at page 3063 that Rupprecht orally agreed to two additional things that 2373 you did not write down in 3063?—A. I am saying that the relations to which du Pont would go as we understood them are contained in my memo of June 13th—the memo of June 3rd.

Q. May 15th. Take your time. A. May 15th.

(Continuing) The memo of the conference of June 3rd, plus my memorandum beginning on 3063.

Q. All right.—A. Now, I will stop there.

Q. Now, there was something, was there not, that you thought he had agreed to and that he thought he had not agreed to?—A. Yes, there was.

Q. And was that in the field of the exchange of technical information?—A. Yes, sir.

Mr. WHITNEY. That is all.

The COURT. You are excused.

(Witness excused.)

The COURT. Exhibit 888.

Mr. DIXON. Before I take that up, your Honor, I am not certain of my recollection but I think we have previously asked of du Pont under the subpoena that any memoranda in connection with these negotiations be returned under the subpoena, and as I recall the return to the subpoena the answer thereto was that there were no memoranda. Is that correct?

MR. WHITNEY. Other than what you already took from our files.

2501 JOSEPH BLUMENFELD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. DIXON:

Q. Where do you live, Mr. Blumenfeld?—A. I am now living in New York City, 322 West 77th Street.

Q. Will you raise your voice if you can so that they can hear you back in the courtroom?—A. Yes, except I have to apologize for my very bad English.

Q. How long have you lived at that address, Mr. Blumenfeld?—A. Since September 1942.

Q. And where did you reside prior to that time?—A. In France.

Q. And what was your address in France?—A. My address in France was in Paris. My business address was 67 Rue de Prony.

Q. And what was your occasion for leaving France to come to this country?—A. The occasion for leaving France was the military events, the occupation of France by the Germans.

Q. Are you employed at the present time?—A. I am working here in the capacity of a consultant with my friends in French potash imports.

Q. What is your business or profession?—A. I am a chemist.

2502 Q. How long have you been practicing that profession?—A. Since 1912.

Q. As a chemist did you do any work or secure any patents relating to the manufacture of titanium pigments?—A. Yes.

Q. And to what company, if any, did you transfer those patents?—A. I did all my work on titanium as an employee of a French company called Societe de Produits Chimiques des Terres Rares, and all my patents were assigned to this company.

Q. What position, if any, did you hold with that company?—A. I was what is called in Europe managing director.

Q. And what generally did you do in that capacity?—A. I directed all technical and industrial and commercial activities of this company.

The COURT. You were its chief executive officer?

The WITNESS. Yes.

Q. Did your company give any licenses under the patents in the titanium pigment business to any other companies?—A. Yes, our first licensee was a French company called Fabriques de Produits Chimiques de Thann et de Mulhouse.

Q. I will hand you what has been marked for identification as Plaintiff's Chart No. 4—

(Marked Plaintiff's Exhibit 1201 for identification.)

2503 Q. —and ask you to examine the portion thereof at the bottom of said chart where you will find the names which we call Aussig— A. Aussig, and here is Bovisa, and there is Thann and Laporte, Kogyo and Commercial Pigments.

Q. I will ask you to state to the Court if you can whether the companies so named and designated on plaintiff's chart No. 4, Exhibit 1201 for identification, were licensees or assignees of the patents of Terres Rares relating to the titanium pigment business?—A. Yes.

Q. Are the dates appearing upon the chart No. 4, previously designated, the approximate dates at which such licenses or assignments were made to the companies whose names appear on said chart and to which we have just referred?—A. I see only one date. It seems to me not quite correct.

Q. Will you so state which one it is?—A. It is Fabriques de Produits Chimiques de Thann et de Mulhouse. It was not in 1924. It was early—either late in 1921 or the beginning of 1922.

Q. Are the companies named on this chart, exclusive of the Commercial Pigments Company, the holders or assignees of the patents of Terres Rares Company relating to the manufacture of titanium pigments all of the companies holding said patents as assignees or licensees.
2504 from Terres Rares?—A. Yes.

Q. Were there any other companies in Europe producing titanium pigments other than those we have just named?—A. Yes. One of the companies was—

Q. Will you state to the Court what the names of those companies were?—A. There was at this time in the early twenties a Norwegian company, working in Norway.

The COURT. Do you remember the name?

The WITNESS. I don't remember the official name. It was a company directed by Mr. Jehsen. And up to the creation—

Q. Might that have been Titan A/S?—A. May be. I don't remember the official name of the Norwegian company.

Q. Proceed.—A. There was later a British company and a German company working according to the patents belonging partly to Dr. Jebsen and friends of Dr. Jebsen.

Q. Were there any other companies manufacturing or engaged in the titanium pigment business in Europe to your knowledge in 1931?—A. In 1931, if I am not wrong, the German company Titangesellschaft was already formed.

Q. Were there any other companies to your knowledge engaged in the titanium pigment business in Europe other than those that we have mentioned, say in 1931?—A. No.

Q. Were there any other companies in 1933 other than those we have mentioned?—A. I don't recollect exactly when Laporte started with production, but it was between 1931 and 1934 some time, but I cannot give you an exact date on it; I don't remember.

Q. What business was the company which we will refer to as Aussig engaged in? Can you state to the Court? Apart from the titanium business.—A. Aussig was a very big chemical concern of the old Austro-Hungarian monarchy. Commonly in the chemical world Aussig was called Austrian IG.

Q. What about the IG? I mean, what position did it have in the European Continent in the chemical field?—A. Titanium or generally—

Q. Generally.—A. The most prominent position. It was certainly the biggest chemical organization in the world.

Q. What about the company that we will call Montecatini in Italy?—A. Montecatini was also a very important Italian company engaged in different chemical production, having about 20, 22 different factories in Italy.

By the Court:

Q. Did they hold a license of yours?—A. Yes, sir.

Q. You did not mention Montecatini before.—A. Oh, yes.

Mr. Dixon. I thought we had, your Honor.

The WITNESS. I mentioned Bovisa. The name is Bovisa.

2506 Mr. Dixon. That, your Honor, is just another name for Montecatini.

The COURT. I remember it now.

By Mr. Dixon:

Q. So that in 1931 through 1933 the companies that you have named constituted the only companies manufactur-

ing and producing titanium pigments in Continental Europe?—A. To my knowledge, yes.

Q. Now coming to the Commercial Pigments Company in the United States, did you have an agreement with that company at any time?—A. Yes, sir.

Q. Do you know a Mr. Chase and a Mr. Ticknor?—A. Certainly, yes.

Q. How did you first become acquainted with either of these two men?—A. I met Mr. Chase and Mr. Ticknor in London in the home of my brother-in-law, Dr. Wiseman. It was, if I am not wrong, in the year 1924 or the beginning of 1925.

Q. Did you have any negotiations with either of these two persons with reference to the granting of the rights on the titanium pigment patents of Terres Rares in the United States?—A. Yes. Mr. Ticknor and Mr. Chase were interested to get an exclusive license for production of titanium pigments according to our process for this country.

2507. Q. Again handing you Plaintiff's Exhibit marked for identification 1201, you will find Commercial Pigments thereon in the letters 1927. Was that the approximate date at which you made an arrangement with Commercial Pigments in the United States?—A. It is the date of the foundation of this company. And of course previous to this date we had a series of discussions and investigation about our process. It lasted for at least one year.

Q. You mentioned the arrangement that you had with Aussig, Montecatini, Thann, Laporte and Titan Kogyo, and I will hand you what we will mark for identification as Plaintiff's Chart No. 2; Exhibit 1202 for identification.

(Marked Plaintiff's Exhibit 1202 for identification.)

Q. (Continuing) I will ask you to examine this exhibit and state to the Court whether or not the countries mentioned thereon underneath the name of the company were the territories in which the companies named were authorized to operate by Terres Rares?

Mr. WHITNEY. I object; it is much too wide. My friend has drawn up an exhibit here for identification which in effect is his final brief and he is asking the witness whether he will confirm the exhibit en bloc as to the countries thereunder.

The COURT. Let me ask you, aren't all these 2508 agreements now in evidence?

Mr. DIXON. They are, your Honor.

The COURT. Objection sustained. It is unnecessary unless you intend to vary the agreement.

Mr. DIXON. No, sir.

The COURT. Do you mean to confirm it?

Mr. DIXON. I wanted to get the exhibit in evidence.

The COURT. Objection sustained. You don't need it.

Mr. DIXON. Of course, apart from some references, your Honor, in the contracts 4 and 6 which recite the territories, there isn't any other evidence—

The COURT. Well, that is sufficient evidence.

Mr. DIXON. All right, your Honor.

Q. Directing your attention to March of 1931, Mr. Blumen 'd, did you have or participate in any meeting at that time in Paris between any of the men from the companies named previously that were engaged in the titanium pigment business?—A. I had several meetings and conversations about the possibility of making an international agreement.

The COURT. This is in 1931?

The WITNESS. It was during 1930 and 1931.

The COURT. In Paris?

The WITNESS. Yes. I am speaking about the 2509 meetings at which I was present. It was in Paris.

The COURT. Very well.

A. (Continuing). And in the beginning of the year 1931 there was a meeting of the various interests involved in this industry.—

Mr. WEBSTER. I am sorry. I can't hear you.

A. (Continuing). At the beginning of the year 1931 there was a general meeting of the various interests involved in the titanium industry including Mr.—I think either Mr. Chase and Mr. Ticknor both or one of these gentlemen was also present.

Q. I will hand you what has been marked Plaintiff's Exhibit 208 and ask you to examine the same and after you have done so to state to the Court whether that in substance represents a transcript of what occurred at that meeting in Paris in March 1931?

Mr. WEBSTER. Is that the exhibit that shows Dr. Latka's notes of a meeting in Paris in 1931?

Mr. DIXON. That is right. Both Dr. Latka and Dr. Jehsen.

Mr. WEBSTER. I say, are those Dr. Latka's purported notes, by Dr. Latka?

The COURT. Is there an objection? I hear none. If

you want to look at the exhibit he is showing the witness, of course you may be permitted to do that.

2510 Mr. WEBSTER. May I do that, please?

Mr. DIXON. Surely (handing).

Mr. WEBSTER. May I ask one or two questions about this?

The COURT. To what end?

Mr. WEBSTER. On the voir dire.

The COURT. He is not going to offer this document in evidence; it already is in evidence. He has been asked to confirm the report. That would not be a ground of objection to his testimony.

Mr. WEBSTER. I will reserve any questions I have about it.

The COURT. Very well.

2511 Q. Now do you have my question, Doctor?—A. You asked me—

Q. (Question read.) A. I think I can confirm that it was so, and as a matter of fact this document of what was discussed during this conference was taken as a basis with certain alterations for the establishment of a subsequent contract.

Q. Now Mr. Chase and Mr. Ticknor and Dr. Jebson were present at that conference, I believe you stated, Doctor?—A. Yes.

Q. When was the next time that you saw Mr. Chase or Mr. Ticknor, if you recall?—A. I saw Mr. Chase, and a few weeks after Mr. Ticknor in July—if I am not wrong July of 1931 in Paris.

Q. I will hand you what we are going to mark for identification Plaintiff's Exhibit 1203—

(Marked Plaintiff's Exhibit 1203 for identification.)

Q. —and ask you if you received that cablegram?—A.

Mr. DIXON. We offer Plaintiff's Exhibit 1203 for identification in evidence.

Mr. WHITNEY. Your Honor, first may I inquire on the record whether we may be assumed to have the continuing objections applicable to documents offered through witnesses, so that we won't have to repeat them each time?

2512 The COURT. Except as to authenticity and authority?

Mr. WHITNEY. Right.

The COURT. Yes, you have such objection.

MR. WHITNEY. Now, if your Honor please, I object to this on the further ground that it has no weight whatsoever in that it states a general proposition and then says to disregard the rumors and wait until a certain individual arrives when he will tell you, so that the exhibit shows on its face that it has no weight.

THE COURT. Overruled.

MR. WEBSTER. I would like to object on the ground that it appears to relate to a transaction in which the National Lead Company has no interest and took no part, and incompetent.

THE COURT. I will allow it.

(Plaintiff's Exhibit 1203 for identification received in evidence.)

MR. DIXON. I would like to read this exhibit into the record, your Honor.

THE COURT. There is no need of that.

Q. Dr. Blumenfeld, after you received this cable I believe you stated you had a conversation with Mr. Chase and Mr. Ticknor?—A. Yes.

2513 Q. Where did that take place?—A. In Paris.

Q. And can you recall what was discussed at that meeting?—A. Mr. Chase explained me all about the amalgamation of Commercial Pigment with Krebs Company insisting that such amalgamation is in the common interest of both companies and indirectly in the interest of our company also, because it will strengthen the position of the whole group working according to patents belonging to my company.

Q. And did you ever see Mr. Rupprecht, Mr. Blumenfeld?—A. I met Mr. Rupprecht twice.

Q. When was the first time that you saw Mr. Rupprecht?—A. I saw Mr. Rupprecht in New York in September 1931, in the offices of Mr. Chase and Ticknor.

THE COURT. And the other time?

THE WITNESS. And two years later, in 1933, in the same offices.

Q. Do you recall what was discussed with Rupprecht in the first time you saw him in September of 1931?—A. Certainly I cannot give you any details about the conversation that took place about fourteen years ago. It was first of all an occasion to introduce me to Mr. Rupprecht. We discussed the general problem of the industry in which our companies were engaged and also the practical way
2544 of realizing for certain of the agreement between our company and Commercial Pigment, an agreement

which was ipso facto in the hands now of a new company.

Q. Do you recall whether any assistance was given to this new company by any of your European associates after this meeting?—A. Yes, I went—

Mr. WHITNEY. I object to that. Of the new company. A meaningless question.

The COURT. Do you want to withdraw your question and reframe it?

Mr. DIXON. Yes.

Q. Do you recall whether either your company, Terres Rares, or any of your European associates that you have described as being in the titanium-pigment business, gave any assistance to this new company, the Krebs Pigment and Color Corporation, in the United States after you met Mr. Rupprecht?—A. Yes. At the request of Mr. Chase and Mr. Ticknor when we were both in Paris, I took with me coming to this country our chemist, chief chemist, de Rohden, and he remained here a few months, I cannot tell you exactly how long, but it was anyhow several weeks.

By the COURT:

Q. You turned him over to Mr. Rupprecht?—A. Yes, and he worked in the factory.

Q. He worked in Mr. Rupprecht's factory?—A. Yes, sir.

Q. In the Krebs factory?—A. Yes, sir.

2515

By Mr. DIXON:

Q. Do you recall who paid the salary?—A. Oh, we continued to pay the salary to our chemist, and his living expenses were paid by the Krebs Company, I presume.

The COURT. You presume? You do not know?

The WITNESS. It was paid. But he worked for the Krebs Company. I did not see the checks.

Mr. WHITNEY. Your Honor appreciates this is all already in evidence and no question was ever raised on it.

The COURT. All right.

Q. I believe you testified you next saw Mr. Rupprecht in July of 1933. What was the occasion for your seeing Mr. Rupprecht at that time?—A. It was—

Mr. WHITNEY. I object to that, your Honor. What was the occasion.

The COURT. I will allow it. He is going to give us the general scene.

Mr. WHITNEY. That is what I am afraid of, too general.

The COURT. We will stop him if he gets too general.

A. The reason why I went to see Mr. Rupprecht here—

Mr. WHITNEY: I object to his reasons.

The COURT: Objection sustained. Tell us the occasion.

2516 The WITNESS: Occasion?

The COURT: Yes? Not the reason.

The WITNESS: All right, if there is any difference. How would you say.

The COURT: At whose invitation did you come? Was it on your own initiative your own invitation?

The WITNESS: I suppose it was the result of an exchange of correspondence.

The COURT: In any event, you came to New York—

The WITNESS: I came to New York in July, and I saw Mr. Rupprecht because there were several problems to be discussed, and the main problem at this time was the international agreement which was in suspense since 1931 after this conference in Paris, and it was very important for all my friends, our licensees, the company to which I referred previously, to know if in the case of an international agreement the American producers will not interfere by exporting in their territory any titanium products. It was obvious that such agreement can only be reached if such security will be given to us and European producers will give the same assurance to American producers.

By Mr. DIXON:

Q. What, if anything, was said by Mr. Rupprecht at that time, if you recall, with reference to the subject
2517 that you have mentioned?—A. Mr. Rupprecht was quite prepared to—

The COURT: What did he say? Not what he was prepared to do.

The WITNESS: I cannot tell you exactly.

The COURT: What was the substance?

The WITNESS: The substance was that the American producers—he will not export in our territory.

Mr. WHITNEY: May we have that read?

The WITNESS: Look here, if I can speak in French it would be much easier for me.

The COURT: Do you want an interpreter.

Mr. WHITNEY: I would just as soon take the French.

The WITNESS: Because if you are—

The COURT: Just a minute, Dr. Blumenfeld. Do you want an interpreter?

Mr. WHITNEY: The question is whether Dr. Blumenfeld will just speak a little louder.

The WITNESS: Certainly. I will try my best.

Mr. WHITNEY. Because we do not always hear clearly. The COURT. I want to be very sure, however, Dr. Blumenfeld, that you will call my attention to it if any question is put to you that you do not completely understand, and also that you will call my attention on any occasion if you feel that your command of English does not permit you to give a complete answer.

The WITNESS. Yes, thank you.

(Question and answer read.)

Q. Can you state to the Court, Mr. Blumenfeld, what you meant by "he" would not export into our territory?

Mr. WHITNEY. May he reframe that question, your Honor? In other words, I am objecting. It is framed in substance "what did you mean?" I would just as soon press him further on what Mr. Rupprecht said, but not what Mr. Blumenfeld meant.

The COURT. Very well.

Q. Do you think you can state in substance what Mr. Rupprecht said?—A. Mr. Rupprecht spoke about his company—

The COURT. The Krebs Company?

Mr. DIXON. The Krebs Pigment and Color Corporation?

The WITNESS (Continuing)—and that the Krebs Company will not export to the market belonging to the European producers—not only in Europe.

Q. Now did you have any conversation with him at that time with reference to any arrangement under discussion with all of the European producers?—A. During 2519 this conversation I informed Mr. Chase and Mr.

Rupprecht about the whole history of the European, of the project of the European agreement, general agreement—

Q. Of the what?—A. I informed Mr. Rupprecht about the general scheme of such proposed agreement.

The COURT. When you say the "European producers" you include not only those who operated under your license but also those who operated under Dr. Jebsen's patents?

The WITNESS. Yes, sir.

The COURT. Very well.

Q. And what, if anything, did Mr. Rupprecht say, if you recall, with reference to those conversations about the plans of the European producers, including Dr. Jebsen's companies and your companies or associates?—A. By answering that he will not export outside the United States I think he gave his answer. I did not follow quite clearly your question.

The COURT. Generally the question, Dr. Blumenfeld, was, did he say anything more on the subject?

The WITNESS. No. It was the main point of the answer.

Q. Now this conversation, I believe, or conference, took place in Mr. Chase's office?—A. Yes.

Q. Was Mr. Chase present?—A. Mr. Chase and I think also Mr. Ticknor. I cannot recollect exactly but I think Mr. Ticknor was also.

Q. Will you state to the Court in what manner you left this conference with Mr. Rupprecht and Mr. Chase and Mr. Beschorman? That is, was there any disagreement?—A. No. We left very friendly with all this conversation, and after this conversation I saw Mr. Beschorman—

Mr. WHITNEY. May I have that read?

(Answer read.)

The WITNESS. Excuse me, Mr. Beschorman was not present in this conversation.

The COURT. Strike out "Beschorman" from the question.

The WITNESS. It was only a conference between Mr. Rupprecht, Mr. Chase and maybe Mr. Ticknor and myself.

The COURT. And after that you saw Mr. Beschorman?

The WITNESS. After that I saw Mr. Beschorman in the offices of Mr. Beschorman with Mr. Chase, and I think that Dr. Jebson was present. I don't remember if he was present but I think he was present.

2521 Q. What did you discuss in Mr. Beschorman's office with Mr. Chase?—A. The object of our conference with Mr. Beschorman was also this proposed general agreement.

Q. I will hand you what has been marked Exhibit 534 and ask you to examine the third page thereof and state to the Court if you can what that is.—A. This memorandum in this form was made by Mr. Chase, and it was the whole question discussed during the meeting between Mr. Beschorman and Mr. Chase and myself. After this meeting in Mr. Chase's office I prepared some notes in French and Mr. Chase put it in this form.

The COURT. Is it an accurate summary?

The WITNESS. Yes, it was an accurate summary. I never contested it.

Q. I will ask you to refer to No. 6 of this memorandum, Plaintiff's Exhibit 534, and state if you will to the Court what you meant by the words "U.S.A. out," as stated on that exhibit?—A. The result was our understanding of what the United States producers of titanium pigment will

not export in other markets except it was a common market in South America; and the European producers will not import in the United States territory.

Q. After this conference which you have described in New York in July of 1933, were there any agreements entered into between the Titan companies so-called 2522 in Europe and your companies or associates?—A. Yes.

Q. I will hand you what has been marked for identification Plaintiff's Exhibit 1204—
(Plaintiff's Exhibit 1204 marked for identification.)

Q. —chart No. 3, and ask you to examine the same and state whether the Aussig agreement stated therein was entered into as specified on that exhibit for the territories covered in and described on chart No. 3.—A. Aussig?

MR. WEBSTER. Your Honor, I believe that is all covered by the agreement, contracts 4 and 6, that are in evidence.

THE COURT. I will allow it only to the extent of his tying it up with this meeting.

MR. WHITNEY. With what, your Honor?

THE COURT. With this meeting.

MR. WHITNEY. Which meeting did your Honor have in mind?

THE COURT. Mr. Beschorman's meeting.

MR. WHITNEY. Thank you, your Honor.

(Question read.)

A. Yes, it is covered.

THE COURT. The answer is Yes. All right.

2523 Q. Will you state whether the same is true with reference to contracts 4 and 6 as shown on Plaintiff's Exhibit 1204 for identification.—A. With regard to the contract a Quatre and contract six also, I make just some slight reserve. I have not under my eyes a contract. So I presume it is correct in the general spirit. There may be someone took this.

Q. In any event, after the meetings in New York these contracts shown on chart No. 3, Plaintiff's Exhibit 1204, were entered into in Europe?—A. Yes. It is practically a repetition of what was already discussed even in 1931, the same principle.

THE COURT. Let me look at 534.

By the COURT:

Q. Dr. Blumenfeld, these 11 points that you have on this memorandum that were shown to you a minute ago, those were discussed by you with Mr. Beschorman?—A. Yes.

Q. Did you also discuss all these 11 points with Mr. Rupprecht?—A. Certainly, yes.

Q. At least you told him about them?—A. Yes.

Q. But from him you asked only for a statement as to whether Krebs would export to the markets of the other countries?—A. It was one of the specific questions what I put to Mr. Rupprecht.

Q. You did not discuss with him for instance— A. With Mr.—

2524 Q. Mr. Rupprecht. Did you discuss with him the division of tonnage under item 1? Did you discuss that with him?—A. I can't tell. Possibly. I can't tell.

The COURT. Very well.

By Mr. DIXON:

Q. In the discussion with Mr. Rupprecht did you state anything to him with reference to the conversations that you had with Mr. Jebesen previous to your meeting with Mr. Rupprecht in July, 1933?—A. Yes. I said what—I informed Mr. Rupprecht about the proposed agreement. Now, the positions of Mr. Rupprecht and Mr. Beschorman were not exactly the same. There were some questions discussed only with Mr. Beschorman.

Q. Did you discuss with Mr. Rupprecht some of the general things under discussion between the European producers previous to the meeting with Mr. Rupprecht in July of 1933? Do you understand my question?—A. I understand it; I think I have already answered it. Yes.

Q. Now I believe you also testified that thereafter you made the contract with TG or Titangesellschaft, for the creation of the Japanese company?—A. Yes, sir.

Q. And was the Japanese territory the territory of Terres Rares and Thann?—A. Yes.

Q. Now, what cooperation, if any, did you have with the Titan companies in Europe with reference to aiding
2525 in serving their markets after the outbreak of the war in 1939?

The COURT. We will suspend at this point. We will take a short recess.

(Short recess.)

Mr. DIXON. Will you read the last question to the witness, please?

Q. (Question read.)—A. At the beginning of the war the companies represented by Dr. Jebesen were cut from their source of supply of titanium dioxide. During this time I offered to Dr. Jebesen to continue the supply of titanium

for his commercial profit from our production in order to insure a very friendly cooperation that we had always with him.

By the Court:

Q. Did he accept the offer?—A. Yes, sir.

Q. And you did supply certain of the titanium companies with titanium dioxide?—A. Yes, produced by our company.

Q. Produced by companies operating under your patents?—A. Yes.

Q. Which companies did that include to whom you extended such offer?—A. Well, to Dr. Jebsen. He was, according to our agreement, for the European zone; he was the man who represented them.

2526 By Mr. Dixon:

Q. Do you recall to what companies, Dr. Blumenfeld, this aid was given? That is, you made deliveries, in other words—was it to BTP?—A. No, not the British company. It was on the Continent.

Q. Just one more question, Doctor. Do you know or can you state to the Court what the approximate productive capacity of the plants of the companies associated with your group, as distinguished from those of the Titan or Dr. Jebsen group, was in 1933?—A. In 1933?

Q. About what it was.—A. One second—

Mr. WEBSTER. Is this question limited to Europe?

Mr. DIXON. Europe, yes.

The WITNESS. Yearly production?

Mr. DIXON. That is right.

The WITNESS. The production—of course approximate figures—

The COURT. Are you going to give us actual production or production capacity?

The WITNESS. Actual production. I cannot correct—it may be 20 per cent less or more. Our French factory in Thann produced 1500 to 1700 tons of titanium oxide.

The COURT. In the pure form?

The WITNESS. In the pure form. All these companies were producing the pure titanium oxide. Bovisa, 2527 the Italian factory, about 2,000 tons, and Aussig about 1,000 tons.

Q. And do you know or can you state to the Court what the approximate productive capacity of those plants were that you have mentioned in say 1938?

The COURT. Are you talking about capacity or produc-

tion, because your last question was addressed to capacity and the witness gave production. Is that what you want? The actual production?

Mr. DIXON. That will perhaps be better. As close as you can give the production.

A. Roughly speaking it was an increase of about 20 or 25 per cent.

Mr. DIXON. That is all. Thank you very much. Your witness.

Cross examination by Mr. WEBSTER:

Q. Dr. Blumenfeld, I want to ask you a few questions about companies and conditions in Europe. I understand the company in which you had an interest, the company which we have called Terres Rares, is the company to which you assigned your patent rights.—A. Yes.

Q. And you owned stock in that company, did you not?—A. Very small stock.

Q. But that was the company that was entitled to license your patents?—A. Yes.

2528 Q. And then that company sold certain patent rights that it had in the United States to a United States company, is that true?—A. Yes, sir.

Q. And it also permitted a company known here as Aussig to use its patents in certain territories in Europe?—A. Yes.

Q. Now you mentioned the size of Aussig. Aussig next to the IG was the largest chemical company in Europe, was it not?—A. Yes, sir.

Q. And it was certainly the largest chemical company in Czechoslovakia?—A. Yes.

Q. And it had enormous industrial and manufacturing capacity, did it not?—A. Yes.

Q. You also referred to Montecatini. Montecatini was the most powerful chemical company in Italy, was it not?—A. Yes.

Q. And it had the right to operate in certain areas using the so-called Blumenfeld patents, is that correct?—A. Yes.

Q. And Montecatini likewise had a very large manufacturing and industrial capacity, did it not?—A. Yes.

Q. And very energetic management?—A. Yes.

Q. And when you licensed the Montecatini Company to use the Blumenfeld patents, a new company was formed, was it not?—A. Yes.

2529 Q. And your French company took a percentage of the stock in that new company?—A. Yes.

Q. In consideration of the Blumenfeld patents, is that correct?—A. That is correct.

Q. Can you recall the date of the contract of Four and the contract of Six?—A. The exact date I do not recall.

Q. I mean the year.—A. Yes, it was in 1933, I think.

Q. Now, in 1933 had the Titangesellschaft built up a large capacity for the manufacture of titanium pigments?—A. Yes.

Q. And your understanding is that that company is operating under its own patents and under the so-called Jebesen patents, the Norwegian patents?—A. Yes, sir.

Q. Now at that time in 1933 Aussig was not engaged on a substantial scale in the manufacture of pigments, was it?—A. No.

Q. And one of the purposes, was it not, of the Contract of Four and Contract of Six was to permit Aussig to take advantage of the manufacturing capacity at that time of Titangesellschaft, is that correct?—A. I shall ask you to repeat this last.

Q. (Read.)—A. Yes, it is correct.

Q. Perhaps I have confused you somewhat by referring to the Contract of Four and Contract of Six. I 2530 should have referred to the Aussig contract.—A. Yes, Aussig and Titangesellschaft.

Q. Which was another contract made in this same general connection, was it not?—A. Yes.

Q. And that was in the nature of an accommodation to the Aussig Company?—A. Yes, sir.

Q. Whose operations at that time were on a pilot plant basis?—A. Yes, sir.

Q. Now, Dr. Blumenfeld, your interests in the field of chemistry are not restricted, or were not restricted, to titanium, were they?—A. No.

Q. You did not understand?—A. Yes, I understood and say "No" to the question.

Q. You had other interests?—A. Yes.

Q. And they were of a substantial character with reference to your titanium interests?—A. Yes, sir.

Q. Now were these arrangements that were made in the Contract of Four and Contract of Six and in the Aussig contract comparable generally to other arrangements that were made by European companies during this period?—A. Yes.

Mr. Dixon. I object to that, your Honor.

The Court. I will allow it.

The Witness. Certainly, yes.

Q. Had you been in business in Europe from the 2531 period following the last World War, that is from 1920 on?—A. Yes.

Q. And had you followed the industrial development of Europe during the twenties and thirties?—A. I think so.

Q. And do you recall in 1926 or 1927 the League of Nations had certain meetings relating to what was called rationalization of industry in Europe?—A. Yes.

Q. And also there was a word that was commonly used at that time with reference to France and Germany called "rapprochement"?—A. Yes.

Q. And there was a movement, was there not, in Europe designed to bring about a closer industrial cooperation between European companies?—A. Yes.

Q. And that was in the interest of rationalizing, if I may use that word, European economy?—A. Yes. It was one reason.

Q. Now you were asked certain questions about a meeting in Paris in 1931. You were present at that meeting?—Yes.

Q. And during part of the time Dr. Jebesen was present?—A. Also present, yes.

Q. And you were shown a sheaf of papers marked Plaintiff's Exhibit 208, consisting of 26 pages. You did not undertake this morning to read every page, did you?

A. No, certainly. I just look on some parts.
2523 Q. And you would not be able to state what portions of that were written by different persons, would you?—A. No.

Q. Now, all of that exhibit which Mr. Dixon showed to you related to the proposed arrangements in Europe, did it not—all of this material?—A. Yes. Certainly it was the understanding between the European producers.

Q. And this was all preliminary to the Contract of Four and Contract of Six?—A. Correct.

Q. And the Aussig agreement?—A. Yes.

Q. And you understood that Dr. Jebesen was representing the Titan companies in Europe, did you not?—A. Yes.

Q. So that when you came to New York in July, 1933, and saw Mr. Beschorman, you understood that the conference with Mr. Beschorman related to the proposed European contracts, did you not?—A. Yes.

Mr. WEBSTER. That is all.

Cross examination by Mr. WHITNEY:

Q. Dr. Blumenfeld, before 1931, you personally had

made a number of inventions in the field of titanium pigments, had you not?—A. Yes, I had.

2533 Q. And in addition to that you had formed this company called Terres Rares, is that right?—A. It was not in addition. It was—

The COURT. Did you form Terres Rares?

The WITNESS. Yes.

Q. You are not trying to correct me in the use of language, are you? We want to get the facts.—A. No, but I would like to understand.

Q. Let us get the facts as best we can.—A. Yes. I founded the company, Societe de Produits Chimiques des Terres Rares.

Q. You assigned these inventions of yours to that company? Did you assign the inventions to that company?—A. Yes.

Q. Did either you or the company apply for patents on those inventions in France?—A. I think I applied. I am not quite sure. I don't remember.

Q. One or the other?—A. Yes.

Q. And in a great many other countries?—A. I beg your pardon?

Q. And in a great many other countries?—A. Yes.

Q. Including Germany?—A. Yes.

Q. Italy?—A. Yes.

Q. Great Britain?—A. Great Britain, yes.

Q. The United States?—A. The United States.

2534 Q. Eventually Japan?—A. Not all.

Q. Some?—A. Very few.

Q. A few?—A. Yes.

Q. Canada?—A. Yes. Also not all of the patents.

Q. Also, only some, of course.—A. Some, yes.

Q. And Italy?—A. Italy.

Q. One of those patents was for a process for producing crystalline titanyl sulfate, was it not?—A. Yes.

Q. Was that a valuable invention in your opinion?—A. It had some importance, yes.

Q. One was for making solutions substantially free from colloidal suspended matter, was it not?—A. Yes.

Mr. Dixon. If the Court please, I wish to rise to object to this line of questioning. I don't know just what the purpose of it is, but if it has any object it would seem to me to relate to passing upon the validity or weight of patents.

The COURT. No, I don't take it that that is Mr. Whitney's purpose. I think I can see his purpose. I will allow the question.

Q. For a solution substantially free from colloidal suspended matter?—A. Yes.

Q. That was a valuable invention, wasn't it?

MR. DIXON. I object to the form of the question.

A. It is very difficult to answer yes or no. I 2535 don't know what is valuable.

MR. WHITNEY. May I say to Mr. Dixon that he qualified him as an expert chemist and I was very free in allowing most leading questions on direct, and I would be most grateful to be allowed to conduct this cross examination, which will be lengthy.

MR. DIXON. Might I say, your Honor, so that there will be no misunderstanding, that we did not endeavor to qualify Dr. Blumenfeld as an expert.

MR. WHITNEY. You succeeded, whether or not you endeavored.

THE COURT. I will let Mr. Whitney qualify him. I am not going to let myself worry unduly about that sort of thing. Do you want to qualify him as an expert on your own behalf, Mr. Whitney?

MR. WHITNEY. No, certainly not, your Honor.

THE COURT. All right. However, I will let you ask him whether he regarded the patent as valuable. The answer was a shrug of the hands with some comment. I forget the exact comment.

THE WITNESS. It is difficult to evaluate exactly.

Q. Would you just say that again? I did not hear it.—

A. It is very difficult to answer yes or no on such a question.

2536 Q. I don't ask you to answer yes or no; answer in your own way.—A. I suppose it has some value.

THE COURT. By that you mean, I take it, that it was not an epoch-making invention?

THE WITNESS. Certainly, yes, it was not.

THE COURT. You agree to that, it was not an epoch-making invention?

THE WITNESS. Yes.

Q. What about seeding hydrolysis? Was that a valuable invention?—A. I think yes.

Q. You think yes?—A. Yes.

Q. We agree. And the patent that related to salt treatment was also a valuable patent?—A. What do you call the patent relating to salt treatment? Can you give me the exact—

Q. What is sometimes called the Blumenfeld and Meyer patent.—A. Oh, yes, calcining in the presence of titanium sulfate.

Q. Calcining in the presence of titanium sulfate.—A. Yes, it was important.

Q. What were some of the other inventions that you had made at or about that time?

The Court. In this field?

Mr. WHITNEY. In this field of titanium pigments.

A. Clarification—a patent for clarification of a solution with some—you know the question of patents is very difficult, some very secondary question presents some interest in the particular process. For instance, a patent for clarification, certainly it is not a basic patent but it is very valuable from the practical point of view. As a patent I will not say whether it is very valuable. I think the application to the process in question, it was very interesting.

Mr. DIXON. Your Honor, just for the record may I have a continuing objection to this line of questioning on the part of counsel?

The Court. All right.

Q. Dr. Blumenfeld does that last patent that you mentioned, or the invention, enable a manufacturer to manufacture more economically than if he did not have the benefit of it?—A. I suppose all the patents have a tendency to render—either to find something basically new or to improve the existing method of production. The improvement can be either in the economical sense or in the sense of improvement of quality.

Q. These patents of yours in the United States had been sold by you or you had given exclusive rights thereunder to the Commercial Pigments Corporation, had you not?—

A. Yes.

Q. That was the company with which Mr. Ticknor and Mr. Chase were associated?—A. Yes.

Q. Were they sold to it or did you give them exclusive licenses?—A. I don't remember if it was assigned or an exclusive license. Really, I can't tell you.

Q. Then that company in turn sold them or its rights under them, you don't remember which, to Krebs, did it not?—A. Yes. I think it was assigned.

Q. This assignment of patents included a number of inventions that you or the French company owned or controlled, other than those made by yourself, is that not so?—A. Yes.

Q. Do you remember some of those?—A. Specifically the name of the person who took the patents?

Q. Yes, just a few.—A. I think it was one patent of De Rohden; I think it was Curisson.

Q. Those would be examples. There were others, were there?—A. May be. Really, I did not go through this question.

Q. You don't clearly remember, I suppose?—A. Yes.

Q. When you say you did not go through this question, what do you mean?—A. Since from a long time I didn't touch, like, on titanium patents.

Q. You mean you did not discuss it with Mr. Dixon?—A. No. I say personally, since a very long time, since about 1938 I was not in direct contact with the titanium question technically.

2539 Q. That makes it difficult for you to remember what happened before 1938, does it? A. To give you the names of the people who applied for patents.

Q. That would apply of course necessarily to all these patents?—A. Even to my personal patents. I don't remember the year when it was specifically applied.

Q. However, at the time, about 1931 and in that period, these patents were sufficiently strong so that they enabled you to conduct rather extensive negotiations with Dr. Jebsen's group, did they not?

Mr. DIXON. I object to that question, your Honor.

A. In my opinion, yes.

Mr. DIXON. Just a moment.

The COURT. All right. I will let the answer stand.

Mr. DIXON. All right.

Q. And such negotiations did in fact take place, did they not?—A. Yes.

Q. Looking to a division or allocation between you and Dr. Jebsen of the various markets?—A. Yes.

Q. That is in Europe I am speaking of now.—A. Yes.

Q. Now, was there any third group of patents that rivalled yours and Dr. Jebsen's groups at that time in Europe?—A. I don't think so.

Q. And did there grow up afterward— A. In Europe.

2540 Q.—during the later 1930s any third group of patents that rivalled yours and Dr. Jebsen's in Europe?—A. In Europe—

Q. Yes.—A. There were some few patents taken in Germany, but—AuerGesellschaft—but our opinion may be wrong, was that they were not very solid; maybe we are wrong; it was our judgment.

The COURT. That they were not much?

The WITNESS. No.

Q. And the only substantial manufacturing in Europe of titanium pigments has been either by companies affiliated with your group or by companies affiliated with Dr. Jebsen's, is that not so?—A. Yes, I think it is so.

Q. Just for a few: Was there during the 1930s any large manufacturer, any manufacturer of a tall size in France other than Thann & Mulhouse or Dr. Jebsen?—A. Dr. Jebsen was never producing in France.

Q. Only Thann & Mulhouse?—A. Yes.

Q. No other companies.—A. Yes.

Q. You were more familiar with France than with any other country, were you?—A. Yes.

Q. You lived there.—A. Yes.

Q. And I suppose that you would file patent applications there as quickly as anyone else—as anywhere else; your filings would be first in Paris, wouldn't they, or at 2541 least as soon as anywhere else?—A. No. I don't think so. We filed, as I say, British or American patents or German because according to French patent legislation it is no preliminary examination of the patents, and we were always interested on the objection of the Patent Office, so—what in this country or in England or in Germany such examination exists.

Q. And this was in accordance with the general policy to file in all important manufacturing countries, was it not?—A. No; to get the examination of the Patent Office on the prior art because in France it was impossible because French legislation does not include the preliminary examination.

Q. In France if any other party filed an application on a titanium invention you would not know about it, would you not?—A. When the patent is published.

Q. Not until the publication in France?—A. Certainly not.

Q. Would you know it before the publication in Germany?—A. Certainly not.

Q. In France?—A. No.

Q. I mean, in Great Britain?—A. No.

Q. In the United States?—A. Certainly not.

Q. Never?—A. Never.

Q. What if an interference were declared in the 2542 United States, wouldn't you know about it then? Suppose you filed in the United States an application

and another party filed an application on the same subject matter and the United States Patent Office declared an interference between them, you would know about the other filing then, wouldn't you?—A. Only in this particular case when called by an official of the Patent Office, yes.

Q. That would also be true in the other countries, would it?—A. No, because in France it was no examination of the patent.

Q. Would it be true in Great Britain?—A. I don't know how it is in Great Britain, the legislation, no.

Q. In Germany. Opposition proceedings I am talking about.—A. Opposition, yes.

Q. Then you would know?—A. I would know that somebody is opposing the patent.

Q. You would have an opportunity to contest the other party's filing, would you not?—A. Opposition, yes.

Q. You kept reasonably close track of all these filings, did you not? You kept as close track as you could of all filings in the principal countries in the titanium pigments field?—A. Yes.

Q. That is certainly so, isn't it?—A. Yes. If not I personally my technical assistants.

Q. Turning back to the manufacturing we spoke of 2542 France. In Germany had there been any manufacturing of any material importance done other than by Titangesellschaft?—A. Titangesellschaft—no, I don't think so. It was the only one.

Q. Czechoslovakia, the Verein, Aussig?—A. The Verein, yes.

Q. In Italy the only one was Montecatini?—A. Montecatini, yes.

Q. Societa Anonima Titanium.—A. Yes.

Q. And in Great Britain?—A. Two.

Q. Two. One being the Laporte Company—A. One the Laporte Company and another British Titan Products.

Q. Then small manufacturing in Norway, I take it, by Dr. Jebsen?—A. Closed since I don't remember what time, but closed since a great many years already.

Q. Any other manufacturing in Europe?—A. Yes, it was a small, the beginning of the manufacture in the year, if I am not wrong, 1937, in Holland, I think it was in 1937; I am not quite certain. But I think it was in 1937 by a company called Noury van der Lande.

Q. That company also entered into an understanding with the Titan and Blumenfeld groups for Europe, did it not, for Holland?—A. No.

Q. It was a competitor in Holland?—A. It was no understanding.

2544 Q. Back in 1937 did it have rights under the Jebson patents?—A. I don't think so.

Q. Did it have any rights under your patents?—A. No.

Q. That is the only one you recall that was—A. Yes.

Q. What was the production of that company before the war broke out, approximately?—A. Maybe a few hundred tons per year.

Q. Now, if a company in America exported into France a product made by a process on which you owned the patents in France, would you be in a position to object in France?

Mr. DIXON. I object to the question, your Honor.

The COURT. I will allow it.

A. It can be done, but it is very hard, and it is—

The COURT. Which is hard, the importation or the objection?

The WITNESS. No. To object legally.

The COURT. It is hard to object?

The WITNESS. Very hard to object because it means a lawsuit and we have to prove that really it was just produced according to such and such patent. The very fact that a company has a patent does not prove what the company is producing according to this patent. So it is always very difficult in cases. But theoretically it is possible.

2545 Q. Now suppose that the company, the American company in that case, has a license under patents of yours and then exports products into France and, further, suppose that you have not licensed that American company to export into France, would you then be in a position to object in France?

Mr. DIXON. I object to the question, your Honor.

The COURT. I will allow it.

A. May I ask you again to repeat it?

Q. Suppose on the same subject, that you have in America a company that you have given a license to under all your patents, and then suppose that you have not licensed it to export into France and it then does export into France?—A. I can object.

Q. You can object in France?—A. I can object in France, certainly.

Q. Now, when you saw these gentlemen in New York in 1931—

The COURT. 1933.

The WITNESS. No. 1931 the first time.

The COURT. In New York?

The WITNESS. Yes.

Mr. WHITNEY. Yes, your Honor, in September 1931.

The WITNESS. September, yes.

Q. Mr. Ticknor, Mr. Chase and Mr. Rupprecht. I believe you said.—A. Yes.

Q. Where was the meeting?—A. In Mr. Ticknor's and Chase's offices.

Q. Which one? Was it in Mr. Ticknor's or in Mr. Chase's?—A. In what room I don't know.

Q. What was the room like? Where was it? Just describe it.—A. It was in a building near Grand Central, where—offices of Commercial Pigments and Commercial Solvents Corporation. What was the room I don't know.

Q. Was that the only time during that trip to America that you saw Mr. Rupprecht?—A. Yes.

Q. Was that the only time during that trip to America that you saw Mr. Chase and Mr. Ticknor?—A. No. I think I saw Mr. Chase and Ticknor—I was a very short time here, a few days; I think I saw Mr. Ticknor and Mr. Chase two or three times, but I saw only once Mr. Rupprecht.

Q. You were on your way to Japan, were you not?—A. Yes.

Q. The purpose of leaving France was to go to Japan?—A. Yes.

Q. In other words, you did not leave home in order to come to the United States?—A. No.

Q. You had the opportunity to come because it was on the way to Japan?—A. Yes.

2547 Q. Now did you make any agreement on that trip with Mr. Ticknor or Mr. Chase or Mr. Rupprecht?—A. No.

Q. You already had your agreement with the Commercial Pigments Company?—A. Yes.

Q. And the Krebs Company had acquired the properties of the Commercial Pigments Company?—A. Yes.

Q. And that situation remained as it was at that moment?—A. At that moment?

Q. At the moment in 1931.—A. Yes. I was told by Mr. Rupprecht that it will be necessary to adjust the question of an exchange of that technical information to a new situation, and we have to find the most practical and effective way of doing so.

Q. This was in September, 1931, meeting?—A. 1931, yes.

Q. And was it then understood that you would discuss

that upon your return from Japan?—A. Yes.

Q. That being the exchange of technical information and the new adjustment of the method of having it?—A. Yes.

Q. Now did you see Mr. Rupprecht upon your return from Japan?—A. No.

Q. Did you try to see him?—A. No, because I was—the traveling arrangement was such that I did not come across those countries.

2548 Q. So there just was not time?—A. It was no question of time that I was not—previous I thought I will come back exactly the same way, but I go through Suez.

Q. So that coming back the same way did not happen until 1933?—A. Yes.

Q. That was your first opportunity to reopen the discussion about the terms upon which you would exchange technical information with Mr. Rupprecht, was it not?—A. With everybody, yes.

Q. On the trip back here in 1933?—A. Yes.

Q. Now in the meantime you had had some correspondence with Mr. Rupprecht?—A. Yes.

Q. For example, he had written you in May, 1932, had he not?—A. Yes.

Q. That he had expected to see you on your return from Japan?—A. Yes.

Q. And that they would arrange at a later date that exchange of information?—A. Yes.

Q. And then you replied, did you not, to that letter, probably about June 1932?—A. Yes.

Q. And you took the position, did you not, that Mr. Rupprecht was wrong in saying that he was free to change the arrangements for exchange of information?—A. Yes.

Q. You felt that he was bound—A. By the previous agreement.

Q. By the agreement with Commercial Pigments? 2549 —A. Yes.

Q. And that was a very important matter of principle, wasn't it? You called it a matter of principle.—A. Yes.

Q. And you wrote also to Mr. Ticknor on the subject, didn't you, and he replied that the matter was in Mr. Rupprecht's hands?—A. Yes, several times I asked Mr. Chase and Mr. Ticknor to assist me in this.

Q. And then you later wrote another letter, in the latter part of the summer of 1932, to Mr. Rupprecht, did

you not, in which you told him that his letter surprised you greatly?

Mr. DIXON. What is the date of the letter?

Mr. WHITNEY. July 27th.

A. I should have a copy of this letter.

Q. I will just give it to you. Exhibit 843-B, page 2955. I want to get the history all straight (handing): "Your letter of May 23rd was received on time. My great delay in replying—"

A. Yes.

Q. I am just reading a few sentences (continuing): "is due to the fact that since my return from the far East I have had to go from one place to another almost constantly.

"I shall not deny that your letter surprised me greatly. When I had the pleasure of meeting you 2550 in New York, we attempted to see how we could most effectively bring about technical collaboration—what do you mean by technical collaboration? Don't try to be exact. I promise I am not going to pin you down.—A. Technical cooperation means exchange of all technical information, the visits to the factories and all pertaining to the patents, in a very broad way.

Q. I think that is a very excellent definition. That was what was on your mind at the time.—A. Yes.

Q. (Continuing reading) "Unfortunately, my too short stay in New York did not allow us to lay a definite plan; however, we did decide that, in order to safeguard our respective interests, we would limit the exchange of all technical information to 3 European plants," namely Thann & Mulhouse, Aussig and Montecatini?—A. Yes.

Q. That was your understanding of what you had discussed and understood at the meeting in New York with Mr. Rupprecht?—A. September 1931, yes.

Q. And then you tell that you had ordered your department to send him an outline. In other words, you did give him some cooperation?—A. No, I think what I am writing here refers to our organization, to send him an outline which would serve as a basis for discussion 2551 roughly means for effecting this collaboration. It was the scheme,—

Q. That was to be the basis of a further agreement between you on that subject?—A. No, it is not a basis. It is a way of effecting this cooperation, a practical scheme; how we will cooperate, I think it is.

Q. In other words, I understand the distinction you make between an agreement that commits a man and

something as a practical scheme that he is going to work along with, and you were just suggesting a practical scheme to work along together.—A. Mr. Whitney, you must read this letter—

Q. I will strike out my question. I only want to make sure I understood what you were saying and I think his Honor understands and we all do.

“We also continued to send you all information as in the past.”

A. Yes.

Q. I had reference to that before, that you gave him technical collaboration.—A. Yes.

Q. (Continuing) “not only because of the conversations which I had the pleasure of having with you in New York, but also because of the formal agreement with the Commercial Pigments Corporation.”—A. Yes.

2552 Q. As a matter of fact, in your view it was rather unfair, wasn't it, for technical collaboration to be only one way without any return from the other side?—A. That is a question of my judgment. It is not a question of effects.

Q. I should think that unless you were more than a human being you would think it unfair to give another company collaboration and get none back. You did feel it was unfair?—A. You can conclude as you like.

Q. I am asking you did you consider it unfair?—A. Really I cannot recollect my feeling 15 years ago. It is rather difficult.

Q. Now we want to leave it there, do we? That you cannot recollect your feelings of 15 years ago—too long ago?—A. Yes.

Q. (Continuing reading)

“Krebs Pigment & Color Corporation having succeeded the latter company”—that is, Commercial Pigments—“it is rather difficult for me to understand how such an important part of the contract could be purely and simply cancelled”——

and then the translator says that is “suppressed”.—A. Yes, I suppose it was “supprimer”.

Q. (Continuing) “as you seem to do in your 2553 letter; and this, as I have just said, after a conference which was to be considered a beginning, not of a suppression of the principle of exchange, but on the contrary, of a search for the most efficient means of effecting said exchange.”

So that confirms, does it not, what you indicated, that the

1931 conference was supposed to be the beginning of what might be a series of conferences, or at least there might be another one, on this subject of exchange of technical information?—A. Not necessarily further conferences. It can be also affected by writing and sending in reports.

Q. Arrangements to be worked out.—A. Oh, arrangements, yes.

Q. And as you said, a practical scheme?—A. Yes.

Q. Now in about September Mr. Rupprecht replied to you. That is page 985, Exhibit 219 (handing). This is from Mr. Rupprecht to Dr. Blumenfeld in Paris, and it says:

“Your letter of July 27th is received”——

that is the last letter we were considering——

“and I regret that there should be any misunderstanding in your mind relative to Krebs Pigment & Color Corporation entering into an agreement with you and your European associates covering exchange of technical
2554 date.

“I can only respectfully repeat that the situation as stated in my letter of May 23, 1932, explains our position.”

I left out that letter because it is already in evidence and he says here he was repeating. (Continuing reading)

“Your former agreement with Commercial Pigments Corporation did not permit of assignment and you were informed that it would be necessary to negotiate an entirely new agreement with the Krebs Corporation.”

Now I understand that that is Mr. Rupprecht's statement of his understanding of the September, 1931, meeting, is it not? He understood that he had informed you that you would have to negotiate an entirely new agreement?—A. Apparently we understood differently.

Q. And his memory therefore was entirely different from your memory? I am not saying which is right.—A. Yes, yes.

Q. I am not in any way reflecting upon your memory.
A. Yes, yes.

Q. Although it was 15 years ago; anybody could forget. But at the time you took different views as to what had been said at the meeting?—A. Yes.

Q. (Continuing reading):

“It was also clearly explained to you that because
2554a of earlier commitments of the du Pont Company, it was impossible for the Krebs Corporation to undertake in their entirety such obligations as were covered in

your former agreement with Commercial Pigments Corporation."

That does conform to what you remember of the meetings, doesn't it? That he explained they could not take all the Commercial Pigments obligations.—A. No; I did not say so. Anyhow, my understanding was that Mr. Rupprecht was willing to work out a new scheme for the practical realization of this technical exchange of information.

Q. And then the only difference between you is that he said that it was to be an entirely new agreement?—A. Yes, and even according to this letter of July 27th, I agreed during this conversation to restrict only to the three companies working under my process, licensees of our company, the benefit of this exchange.

Mr. WHITNEY. Dr. Blumenfeld is just emphasizing in his letter of July 27th that he had made this concession that he restricted the exchange to the three Blumenfeld companies.

Q. That is you excluded from the exchange the European Titan companies, is that right?—A. Oh, certainly. It was absolutely no question about the European Titan companies, because I have no agreement about exchange of information with those companies. With Dr. Jebsen I never had such agreement.

Q. Then Mr. Rupprecht continues:

"At my meeting with you in New York in September 1931, we talked over a possible agreement in a preliminary way, and it was understood that you would return for another conference in December 1931, at"—

A. Yes.

Q. We can skip over that.—A. Yes; but apparently he was very angry.

Q. "As you did not pay us this promised visit." Do you agree you had promised to visit him in December?—

A. Certainly my plan was at that time to come back from Japan exactly by the same route. It means through Canada and the United States. If you call this a promise, I promised it.

Q. Did you make him a promise that you would come back in December?

The COURT. The question is did you say, "I promise to come back" or did you say "I plan to come back."?

A. I plan to come back.

Q. Is there much of a difference between the two?—A. I do not know. Precisely I cannot understand your question.

Q. I mean what we are talking about— A.
2556 Maybe it is my bad English or bad knowledge of English.

Q. Well, I have the greatest sympathy with you, because there are occasions where I have had to do business in the French language, and I should say I did much worse than you are doing here.—A. No, I cannot understand what you ask me.

Q. It is a very small matter, but I would like to clear it up. In September of 1934 you and Mr. Rupprecht were talking together?—A. Yes.

Q. And afterwards Mr. Rupprecht said, "You promised me to come in December" and you said— A. No. Maybe I promised. I do not really know.

The COURT. You know the difference when you say to your wife, "I plan to take you out to dinner," or you say, "I promise to take you out to dinner"?

The WITNESS. No. I said to Mr. Rupprecht, I have to leave because the accommodations at the boats were such it was necessary to leave New York at a definite date. "I will come back here and we will continue our discussion." What do you call this; promise or plan? I do not know.

The COURT. Let us say you told him what your then intention was.

The WITNESS. Yes, exactly.

Q. And according to this letter he received it and he understood it as a promise?—A. Maybe.

2557 Q. And do you now remember that he was right or wrong?

The COURT. Meaning by that (referring to witness's gesture) "I don't remember"?

The WITNESS. Really, no.

The COURT. The reporter could not take down your gesture.

Mr. WHITNEY. I felt that he was sort of warming up.

Q. I take it that the gesture his Honor and I were talking about meant "We cannot expect you to remember whether, as you say, 15 years ago, it was a promise or a mere statement of what you intended to do"?—A. (No answer.)

Q. Let me repeat, that when you make a gesture of spreading your hands, that his Honor and I were talking about, it means, does it not, that we cannot reasonably expect you to remember— A. If it was a promise, or a plan?

Q. Right. Is that right?—A. Yes.

Q. Now the letter goes on:

"You undoubtedly realize that because of the changed conditions, a number of new factors must be considered, and it is impossible to attempt by correspondence, an outline of the limited agreement we are now permitted to discuss."

2558 Q. That meant there were a number of new factors that you and he had still to consider together in the future, did it not, and that he was only permitted to discuss a limited agreement, "but if you care to visit us again we will be glad to go into the matter." You did visit him again, didn't you?—A. In 1933.

Q. In order to go into the matter of the further working out?—A. Yes.

Q. Now when you saw him in 1933, in July, was it in the same office in which you had seen him in September of 1931?—A. Yes.

Q. Do you remember any more clearly, going a second time, just which office it was? What room?—A. No.

Q. Do you remember any of the furniture?—A. No.

Q. The way the room was arranged?—A. No.

Q. Do you remember the way the parties sat; who sat where?—A. No.

Q. Do you remember whether it was the morning or afternoon or the evening?—A. I don't remember.

Q. Do you remember whether Mr. Ticknor was there?—A. As I said already once, I am sure that Mr. Chase was there. I think that Mr. Ticknor was also.

Q. And was anyone else there with you?—A. No.

Q. Are you sure of that—from Europe?—A. From my company?

2559 Q. Yes.—A. No, nobody. It was only my man of the technical staff went with me, but he was not present at the conversation.

Q. Was that Mr. Curisson?—A. Oh, 1933? It was Mr. Currisson was here:

Q. He was at the meeting, was he?—A. Maybe, but he does not speak at all. Maybe.

Q. When you said there was nobody with you, you meant nobody who spoke at all?—A. Yes. If he was there he was a silent person.

Q. Do you now remember whether or not he was there?—A. No, I don't remember if he was.

Q. So you do not remember whether or not Mr. Ticknor was there? Is Mr. Ticknor a man who does not speak at

all?—A. Oh yes, he speaks.

The COURT. I know not only that he speaks but that he writes.

Q. Let me see: You don't remember whether Mr. Curisson was there, because he is a man that does not speak at all?

The COURT. English?

The WITNESS. English.

Q. You don't remember whether Mr. Curisson was there, your technical man, because Mr. Curisson does not speak?

The COURT. I got it. We are devoting considerable more time to it that the subject merits.

2560 Mr. WHITNEY. I am glad to hear that from your Honor.

The COURT. I assume most of these questions are designed to test the memory of the witness; within the limits that you are entitled to that, but let us not overdo it.

Mr. WHITNEY. Your Honor, with great respect I am trying to get what happened at the meeting, and he was there. That is to say the first meeting that has ever been testified to in this case under an examination from the Government which brought the case, so I say although I attach no importance to the meeting, and therefore agree with your Honor, I am paying a sort of respect to Mr. Dixon's enormous importance that he evidently attaches to it. That is all I am doing.

2561 The COURT. If the witness knows the exact arrangement of the furniture, the exact color of the tie he wore, and the suit he wore, I still would not ascribe an undue degree of memory of events that occurred in 1933, because I proceed on the mortality table of memory.

Mr. WHITNEY. And in that you are in harmony with the witness himself, who has said that.

Q. Well, Dr. Blumenfeld, I take it then that in any event you, Chase and Rupprecht were there?—A. Yes.

Q. And we are not to know whether Mr. Ticknor and Mr. Curisson were there. Did Mr. Rupprecht bring anyone with him?—A. No, I do not think so.

Q. How long did the meeting last?—A. It was a meeting maybe one hour, or maybe one and a half hours or two hours, something like that.

Q. You had come, as you say, to the United States in order to follow through the subject that had been under discussion between you, and correspondence between you, about this exchange of technical information, is that right?

—A. I said wh^{at} I went to see Mr. Rupprecht for was

several reasons, and the main reason was the very difficult position in which I was in Europe about the proposed general agreement, and for this reason it was deemed essential for me to know what will be the attitude of the Krebs Company regarding the export in other territories outside of the United States because it was the first question that all my associates put before me before signing any agreement.

The COURT. That is, they did not want to make an agreement with you if your position was not secure on the question of American importations?

The WITNESS. Yes. So what was the main question, the single question, was the question of technical information, and we also mentioned this question, and Mr. Rupprecht—it was a very friendly conversation—and Mr. Rupprecht said that he will work out something; that the situation is very difficult because lots of other obligations are involved and he will give very, very careful consideration to this question in order to find some solution.

Q. You remember clearly that it was a friendly discussion?—A. Absolutely, because I remember, and I had opportunity to write him a letter thanking him for this very friendly—

Q. It was not a matter of sort of trading one against the other?—A. No. It was very, very, friendly.

Q. It was not a matter of negotiating a difficult agreement or anything of that sort?—A. No, not at all.

Q. It was a situation in which you had concern about the question and asked Mr. Rupprecht his attitude, was it? I think that is what you said; what would be his attitude?—A. Yes.

Q. And he told you, did he, what his attitude was?—A. And he told me what his attitude was.

Q. Now do you remember in 1931 there had been a question of what you intended to do about coming back from Japan? Did Mr. Rupprecht say something about what he intended to do?—A. In 1931?

Q. In 1933.—A. In 1933, no. He said what do I think about the technical cooperation. He said the situation was very complicated because Krebs was connected with du Pont and it was a rather complicated situation and he will find the proper way of—he will try to find the proper way of settling this question.

Q. He put you off, in other words?—A. I was not under this impression because as I was told always by Mr. Ticknor and Mr. Chase, that when the deal was done be-

tween Commercial Solvents and Krebs the whole situation about the continuation of the technical information was secure by them.

Q. And so that when Mr. Rupprecht talked with you on the subject of the technical information you took on the whole a favorable or a comfortable view of what he said,

because you had in mind all the time what Mr. Ticknor and Mr. Chase had often told you before?

—A. Absolutely, not only often, but at the time when after this cable informing me that Chase is coming to the views, we produce a memorandum about this conversation.

Q. Now in fact afterwards Mr. Rupprecht did not give you full technical cooperation, did he?—A. Not even full—not at all.

Q. Were you displeased by that?—A. Certainly, and you see in my letters that I was displeased.

Q. Now before you had come to America you had had in the earlier years conversations in Paris with Mr. Ticknor and Mr. Chase about agreements with the American manufacturers that they would not sell in Europe, had you not? I say before this time.—A. Before 1931?

The COURT. Before 1931 or—

Mr. WHITNEY. Before 1933.

The WITNESS. Between 1931 and 1933?

Mr. WHITNEY. No, between 1925 and 1933 when you were dealing with Ticknor and Chase in Paris off and on.

The WITNESS. Ticknor and Chase appeared up to 1931 as Commercial Pigments. Only after the amalgamation it changed and Rupprecht appeared.

Now during those years they had often discussed with you the question of the American manufacturers agreeing not to export into Europe, had they not?—

2564a A. Our contract was such a one.

Q. Your contract so provided with them?—A. Yes.

The COURT. With Commercial Pigments?

The WITNESS. Yes.

(Recess until 2:15 p.m.)

2565

AFTERNOON SESSION

JOSEPH BLUMENFELD, resumed the stand.

Cross-examination continued by Mr. WHITNEY:

Q. Dr. Blumenfeld, there is in evidence a letter of October 9, 1933 to you from Mr. Rupprecht. I hand you a copy so you can follow. It is Exhibit 286 for the Govern-

ment, page 1166 of the printed papers. I would like to run over it with you:

"Dear Mr. Blumenfeld:"—this of course was three months after the New York meeting of 1933—

"I beg to acknowledge receipt of your letter of September 18th, 1933. I regret very much that apparently some misunderstanding remains in your mind as to the relationship between Krebs Pigment & Color Corporation and Societe Terres Rares and you.

"Our position in respect to the subject matter of your letter is simply this:—

"Krebs Pigment & Color Corporation purchased all of the assets of Commercial Pigments Corporation on August 1, 1931, free of any contractual obligation. Included in these assets were the patents and inventions to which Commercial Pigments Corporation was entitled under their agreement of March 24, 1927 with Societe Terres Rares and you. You will note by reference to this agree-

2566 ment that Commercial Pigments Corporation was entitled to all inventions, patentable or not, relating to titanium oxide, which you or the French company discovered or possessed. The patents and inventions received by Krebs Pigment & Color Corporation from the Commercial Pigments Corporation were in the same category as its buildings, plants and physical property.

"There is not nor has there ever been any contractual relationship between Krebs Pigment & Color Corporation and Societe Terres Rares and you."

That is true, isn't it?

The COURT. You are not asking his opinion as to the legal—

Q. Is it true that there never had been any contractual relationship between Krebs and Societe Terres Rares and you?

Mr. DIXON. If the Court please—

The COURT. Objection sustained. I am not going to let this witness decide whether a close legal question of assignment of a patent carried with it a possible burden or whether it did not carry any such burden imputed by law in the transfer of an inchoate right or a choate right like a patent.

Mr. WHITNEY. Right, your Honor. As this letter was addressed to him, may I ask him this question?

2567 Q. When you received this letter were you in agreement with Mr. Rupprecht in what he says here, that there had been no contractual relations be-

tween his company and yours, or were you in disagreement with him?—A. My company was absolutely in disagreement.

Q. But there was no doubt in your mind as to what Mr. Rupprecht was saying, was there, in this sentence? This sentence was clear to you? The sentence that I have just read.—A. If we understood the letter; certainly we understood the letter.

Q. "Such a relationship did exist between you and Societe Terres Rares and Commercial Pigments Corporation but was not assumed by Krebs. This position, you will recall, was made clear to you by Messrs. Ticknor and Chase upon their visit to you in France in August 1931, when they stated that you would have to make a new arrangement with the Krebs Pigment & Color Corporation. Moreover, as we have previously advised you, the agreements between Commercial Pigments Corporation and your company were not assignable."

And then down at the end, I skip the next two paragraphs, I don't think we need go over them:

"Therefore, since all our rights in patents and inventions were obtained from Commercial Pigments Corporation as part of the assets of that corporation, we cannot recognize any obligation arising from contracts existing between Commercial Pigments Corporation and Societe Terres Rares and you."

That also is clear?—A. Very.

Q. And also was in disagreement with your position, was it not?—A. It was in complete disagreement with my company, yes, sir.

Q. "Assuring you again of my sincere regard and with cordial good wishes, I am

"Sincerely,

"C. H. RUPPRECHT,
"President."

A. Yes.

Mr. WHITNEY. That is all.

The COURT. Any redirect.

Mr. WEBSTER. Your Honor, there are one or two things I want to ask in the nature of further cross, just two or three questions, before Mr. Dixon resumes.

The COURT. Very well.

Cross-examination continued by Mr. WEBSTER:

Q. Just one minor factual situation I would like to clear up. I think I failed this morning to ask you about the

licenses granted to Laporte, that is the National Titanium Pigment Company. You did grant licenses under your patents to Laporte, did you not?—A. Yes, sir.

Q. For what territory?—A. If I am not wrong, 2569 for the British Empire, excluding Canada.

Q. In consideration of that you obtained stock in the Laporte Company, did you not?—A. Yes, sir.

The COURT. You or Terres Rares?

The WITNESS. Terres Rares. When you speak about "you" it was always my company.

Q. You also obtained the right to appoint directors to the—A. To the board of this company.

Q. Nominate directors for the board of Laporte?—A. Yes. Not Laporte, but with the Titanium Company. It was—what was the company. National Titanium Pigments.

Q. National Titanium Pigments Company, Ltd.—A. Yes.

Q. Did you exercise that?—A. No.

Q. Did you in fact take or have any voice in the affairs of the National Titanium Pigments Company?—A. From a technical point of view, certainly we advised them, but from a general conduct of the business, not at all.

Q. That is, you took no part whatever in the management of the company?—A. No.

Q. You had no part in the arrangements that were made between the National Titanium Pigments Company and the British Titan Products Company?—A. No.

Q. Or the Canadian Titan Products Company?—A. No.

Q. All of the arrangements or decisions that they made were made independently of you?—A. Absolutely.

Q. And without consultation with you?—A. Absolutely.

2570 Q. Now in Exhibit 534 which was shown to you this morning, which is a copy of a letter from Mr.

M. F. Chase to Mr. Beschorman dated July 20, 1933—

A. With the short memorandum?

Q. With a short memorandum attached.—A. Yes.

Q. —Mr. Chase says on July 20, 1933:

"Before Mr. Blumenfeld left, he was so pressed for time that he did not have an opportunity to prepare the memorandum that was spoken of when we were in your office, but he jotted down the points in longhand and gave them to me. I have had them copied and am enclosing two copies for you."

That is the memorandum which you say you gave to Mr. Chase in French, is it not?—A. Yes.

Q. And that he translated and attached to the letter that was shown to you this morning?—A. Yes.

Q. Now that memorandum is headed "Memorandum Respecting Commercial Arrangements Between Blumenfeld Group and IG Group." You were referring there only to the Blumenfeld group in Europe, were you not?—

A. Yes.

Q. And the IG group in Europe?—A. Yes. Covering also territories outside of Europe.

Q. What?—A. Covering also territories outside Europe but excluding the United States.

Q. But excluding the United States?—A. Yes.

2571

Q. In other words, you were referring to the countries in which the so-called European Blumenfeld group and the IG group operated at that time?—A. Yes.

Q. Now, for example, in item No. 10: "Delivery of products to meet quotas must be on a mutual basis." The quotas referred to there are exclusively quotas outside the United States?—A. May I ask you to show me that, please?

Q. There is a reference to this item No. 10 in the third paragraph of the letter.—A. Yes. "Item No. 10 is not very clear to me, but I think what is meant is, in case"—

Q. In this letter in the third paragraph it says: "Item No. 10 is not very clear to me, but I think what is meant is, in case either party to the agreement obtains material from the other party in order to fill its quota, the price that is charged for such material shall be on a same basis. I presume it is contemplated that the material for Dr. Blumenfeld's quota in Belgium and Holland may be furnished in part by the IG and part of the IG's quota in France may be filled with material furnished by Thann."

A. Yes.

Q. All of that refers, does it not, to this item 10 which says: "Delivery of products to meet quotas must be on a mutual basis," and that all refers to the operations of the companies outside the United States?—A. Yes.

Q. Now you knew, did you not, at that time that
2572 the National Lead Company and the Titan Company, Inc. had licensed a number of companies outside the United States to use the patents, the Norwegian and the American patents?—A. Yes.

Q. And you therefore could not conceive of the National Lead Company engaging in export trade, could you?—A.

Certainly not, because in all our conversations with Mr. Jebson Mr. Jebson said repeatedly that he represents Titan, Inc. and what are rights on the territories outside of the United States belongs to the Titan, Inc.

Q. And you knew, did you not, at the time this letter was written and at the time these conferences were held that the patent situation was such that the National Lead Company could not engage in export trade?

Mr. DIXON. I object to that question, your Honor.

The COURT. Sustained.

Mr. WEBSTER. That is all.

The COURT. I will look at Exhibit 534 if you don't mind, Mr. Webster.

By the COURT:

Q. Now, Dr. Blumenfeld, when you prepared the notes from which Mr. Chase prepared the memorandum which is attached to this exhibit, you had already had your conversation with Mr. Rupprecht?—A. And Mr. Beschorman.

Q. And Mr. Beschorman?—A. Yes, sir, your Honor.

2573 Q. And the foundation therefore of your memorandum was that you understood that the American producers would not export to any of the markets outside the United States?—A. Yes.

Q. Now, is that what you meant by 6 or is there something else that you would say on item 6?—A. Only this:—

Mr. WHITNEY. May I respectfully say to your Honor that if your Honor asks whether the foundation in his mind was something, isn't the witness bound to answer yes?

The COURT. Objection sustained, and I will withdraw the question.

Mr. WHITNEY. No. I would like to take an exception to the question, your Honor, with great respect.

The COURT. Yes. I sustained your objection to it, and I will order the answer stricken out because I think it was an improper question.

Mr. WHITNEY. Thank you.

2574 Q. Now you have already testified as to what you think item 6 meant, and I think you testified to that without objection.

The COURT. Am I correct about that?

Mr. WHITNEY. That is right, your Honor.

Q. Would you tell us again, Dr. Blumenfeld, what you meant by item 6?—A. That European producers will not import into United States territory and vice versa, what

the United States producers will not import into the territory reserved to the European interests.

The COURT. Very well. Any redirect? If I have not said it before, let me state it now, that it is always my practice to remind counsel that on questions put to a witness by the Court an objection may be taken thereto; if on reflection I find your objection well taken I will sustain the objection. I do not mean that to be pro forma. I merely intend to do that because in framing a question one does not always see the possible objection that may occur to counsel.

Redirect examination by Mr. DIXON:

Q. Mr. Webster asked you, Dr. Blumenfeld, in referring to that memorandum, Exhibit 534, as to whether that applied only to the territories in which the companies were then operating, as I recall his question. Did it 2575 also cover the territories outside of the particular places where they were then manufacturing the products?—A. Yes.

Q. In other words, referring to Chart No. 2, Plaintiff's Exhibit 1202 for identification, did it cover the territories allocated to these various companies as shown on Chart No. 2?—A. Yes.

Q. Now Mr. Webster also indicated that these agreements as shown in Chart No. 3 of Aussig and Contract a Quatre and Livraisons Agreements, were with the approval of the Governments of some of the European countries?

The COURT. I don't remember any such question. Objection sustained.

Q. So that the record may be complete as to your correspondence with Mr. Rupprecht on the matter concerning which Mr. Whitney examined you, I will hand you what—

The COURT. Do you really think anything has to be done here to make the record complete?

Mr. DIXON. I just wanted it pro forma, your Honor.

The COURT. Are they in evidence?

Mr. DIXON. They are not in evidence.

The COURT. Oh, you want to offer some letters in evidence.

Mr. DIXON. Yes, sir.

The COURT. Just go right ahead and offer them. 2576 You don't need anybody's consent.

Mr. WHITNEY. Except the continuing objection. (Plaintiff's Exhibit 1205 marked for identification.)

Mr. WEBSTER. I don't believe I have ever seen these letters.

The COURT. He will show them to you right away. That is what this is for.

(Plaintiff's Exhibit 1206 marked for identification.)

The COURT. Are they in a foreign language?

Mr. DIXON. The first one is, your Honor; it is in French. Exhibit 1206 is a copy of Dr. Blumenfeld's reply or, rather, Mr. Rupprecht's reply to Exhibit 1205 sent to him by Dr. Blumenfeld. We would ask that unless it is agreed to by defendant du Pont that the originals or copies be produced from their files if they are available.

The COURT. What do you want the original for? He is not objecting to a copy.

Mr. DIXON. That is certainly all right.

The COURT. I don't understand that any objection is raised on the ground that this is not the original.

Mr. WHITNEY. I don't raise that objection.

The COURT. But I suggest that you stipulate to substitute a translation for the original.

Mr. DIXON. The reason for this, your Honor, 2577 is that this was not in our file and I did not at this time know until I asked counsel for du Pont whether or not it was in their file.

Mr. WHITNEY. It was in Dr. Blumenfeld's file.

The COURT. Is it stipulated that the Government may substitute an English translation consented to by both counsel in lieu of 1205? Is it so stipulated?

Mr. DIXON. Subject to the stipulation we will offer them in evidence, your Honor.

Mr. WEBSTER. With the understanding that these are copies from the du Pont files, we make no objection on the ground of authenticity, and simply take the objection we made before, that it is a transaction not connected with National Lead Company.

(Plaintiff's Exhibits 1205 and 1206 for identification received in evidence.)

Mr. DIXON. That is all, Doctor.

Recross examination by Mr. WHITNEY:

Q. Have you got in front of you this Exhibit 534 to which you have been referred?—A. Which one? The letter from Mr. Rupprecht?

Q. The letter from Mr. Chase to Mr. Beschorman with a memorandum attached.—A. Yes.

Q. Under what circumstances did you write that? Was it before you met with Beschorman?—A. No, after. 2578 After the conversation with Mr. Beschorman.

Q. Did you write notes about it while you were

with Mr. Beschorman? Did you write notes about that subject while you were with Mr. Beschorman?

The COURT. Do you understand the question?

The WITNESS. Yes, yes. During the conference I took notes. I don't remember if I took notes before or just after.

Q. Is this an exact copy of your notes?—A. It is not a copy; it is a translation.

Q. But is it a translation of the notes that you took with Mr. Beschorman?—A. Yes. I suppose because I never corrected it and I never sent—

Q. In other words, it was notes made during a meeting with—

The COURT. The witness did not say so. If you want to press him as to whether that is what they are, I will let you do that.

Q. Is it or is it not the fact that they were notes written by you during the conversation with Mr. Beschorman?—A. I answered, Mr. Whitney—

Q. Never mind. I am asking you now. Take one at a time.—A. Yes.

Q. His Honor corrected me on my question. I am now asking you, and that is all you need answer, is it or is
2579 it not a fact that this memorandum is a translation of the notes which you wrote out in longhand or otherwise while you were sitting with Mr. Beschorman in the meeting?—A. I answered you that I have no recollection of making notes during this meeting.

Q. And do you now think that you made the notes after the meeting?—A. Yes. I am rather inclined to think that it was after.

Q. Will you look at the first paragraph of Mr. Chase's letter to Mr. Beschorman.—A. Yes.

Q. "Before Dr. Blumenfeld left he was so pressed for time that he did not have an opportunity to prepare the memorandum that was spoken of when we were in your office, but he jotted down the points in longhand and gave them to me. I have had them copied and am enclosing two copies for you." So these were written after the meeting, as you now recollect?—A. Yes.

Q. After the Beschorman meeting?—A. After the Beschorman meeting.

Q. Now did you send a copy to Mr. Rupprecht?—A. No.

Q. Did you invite Mr. Rupprecht to the Beschorman meeting?—A. I had not to invite Mr. Rupprecht to any meeting.

Q. Is the answer no?—A. No.

2580 Q. Now referring to the memorandum, on the question of point 6—A. Yes.

Q. Point 1 deals with division of tonnage. In that division between the two groups, Blumenfeld group and the I.G. group?—A. This point means what the tonnage sell in form either of pure titanium or in the form of mixed pigment will be, always calculated on the basis of pure titanium content.

Q. What does the word "Division" mean? The first word.—A. I was not expert in the English language and it is not my translation. I presume that Mr. Chase was competent enough to choose the proper word.

Q. Just read the title: "Memorandum Respecting Commercial Arrangements Between Blumenfeld Group and I. G. Group."—A. Yes.

Q. Now that is the subject of the memorandum.—A. Yes.

Q. Now the first word in the entire memorandum is: "Division," and the next words are "of Tonnage to be based on"—is it that division between the Blumenfeld group and the I.G. group?—A. Certainly.

Q. Paragraph 2: "Aussig Territory to be coextensive with I. G. and arrangements made by Aussig and I. G. to govern." Aussig was a Blumenfeld company, wasn't it?—A. Yes.

The COURT. It operated under your patents?

The WITNESS. It operated under my patents.

The COURT. That is what he means.

Q. And I.G. was a Titan company?—A. Yes.

2581 Q. That represents an agreement as between Aussig and IG as to territory, does it not?—A. Yes.

Q. "3. British Empire free to both parties." "Both parties" means Blumenfeld and Jøbsen?—A. Yes.

Q. "4. Italy reserved for Montecatini."—A. Yes.

Q. That means reserved for the two groups, doesn't it?—A. Yes.

Q. "5. Scandinavian countries including Finland reserved for Titan Co." That means reserved by the two groups, doesn't it?—A. Yes.

Q. Yes. "6 U.S.A. out."—A. Yes.

Q. That means the two groups exclude the U.S.A. from the consideration of this agreement?—A. This means just that both groups are in agreement not to import into United States.

Q. Where do you get that from? Do you remember that somebody said— A. Absolutely, because it was.

Q. Just a moment.

Mr. DIXON. Let the witness finish.

Mr. WHITNEY. No. He would not let me speak to him during the lunch hour.

Q. Your memorandum is entitled "Memorandum Respecting Commercial Arrangements Between Blumenfeld Group and I.G. Group"; isn't that the subject matter? Isn't it?—A. What I can only tell you is the memorandum was not written by me.

2582 Q. You say you are not the author of this memorandum?—A. No, no, the title. I just gave my points of making a resume of our conversation in the office of Mr. Beschorman.

The COURT. And when you got this memorandum, or a copy of it, from Mr. Ticknor, you read it over and you found it corresponded with your recollection?

The WITNESS. Yes.

The COURT. At that time you of course read the title as well?

The WITNESS. Yes. I have no, even now, objection against the title.

Q. Did you tell him that the title was in error?—A. No.

Q. Now we are dealing with a memorandum on the subject of the commercial arrangements between two groups, aren't we?—A. Yes.

Q. And the first five articles deal with a division between the two groups, don't they?—A. Yes.

Q. Turning to 7: "France, Belgium, and Holland to be grouped and quotas to be discussed." That is to be discussed between the two groups, isn't it?—A. Yes.

Q. "8. Remaining countries one-third to Blumenfeld, and two-thirds Jebson."—A. Yes, sir.

Q. That is a division between the two groups, isn't it?—A. Yes.

2583 Q. "9. No new factories to be built until present existing plant capacities have been absorbed." That is in Europe?—A. It is about European properties, yes.

Q. "Present capacities have been absorbed. Present capacities to be stated."

"10. Delivery of product to meet quotas must be on a mutual basis"—A. Yes.

Q. That is mutual as between the two groups?—A. Yes.

Q. "11. Excess tonnage of Montecatini over and above

Italian requirements to be handled in the same proportions as is agreed upon for Item No. 7"?—A. Yes.

Q. Now every single paragraph of that exhibit, except paragraph 6, is specifically dealing with the subject given in the title?—A. Yes.

Q. And the only thing that 6 says is that "U.S.A. out"?—A. Yes.

Q. It does not say another solitary word, does it?—A. No.

Q. I want you to tell me precisely why this means the U. S. manufacturers agree that they will not export to Europe.—A. Because it was the preliminary and necessary condition for European producers not to sign any contract if such important factor in production as American producers would be free to import in their territories.

Q. Therefore the reason that you say that the 2584 one word "out" means these words "Manufacturers have agreed that they will not export," is because when you came to America it was your personal opinion that the European people would not agree unless that were so?—A. It was not my personal opinion. It was a very real opinion of all other European producers.

Q. Precisely. And all the European producers believed that it would be embarrassing to them to make agreements between the two groups unless they had obtained the agreement by the American manufacturers not to import. Was that the opinion of all the European producers?—A. Yes.

Q. Now what representative of I.G. told you that was his opinion?—A. I never dealt directly, because all dealings with I.G. were effected by Aussig.

Q. But you are telling us the opinion of all European producers without, for example, having spoken to any I.G. man.—A. I knew the opinion of I.G. through a representative of Aussig.

Q. And that is the source of your knowledge of it?—A. Yes.

Q. Now then you came to America with that in mind?—A. Yes.

Q. And you wrote a memorandum before you went back to Europe and the only thing in the entire memorandum that dealt with that subject was the words 2585 "U.S.A. out."; is that true?—A. Yes.

Q. And you left it at that?—A. Yes.

Q. And you never did anything more about it?

Q. And you did not send the memorandum to the

Pont Company, did you?—A. Mr. Chase was a director of the Krebs Company.

Q. Did you ask him to send it to Mr. Rupprecht?—A. It is not for me to ask the director of the company.

Q. But wasn't this what you were interested in?—A. Mr. Chase certainly informed by himself.

Q. Mr. Chase certainly informed Mr. Rupprecht? Do you say that?—A. I say it was not for me to watch that such and such document should be forwarded to the Krebs Company when I was in discussions with one of the directors of this company.

Q. But you say you came to America in order to accomplish that?—A. But I have conversations with Mr. Rupprecht, and Mr. Rupprecht gave me all necessary appeasement.

Q. He gave you all necessary appeasement?—A. Yes, sir.

The COURT. He put your mind at rest? That is what you mean?

The WITNESS. Yes.

2586 Q. Did he put your mind at rest on the subject of working out a system for working out technical cooperation? Did he put your mind at rest on that?—A. Will you pardon me. At the beginning of your question I said—

Q. Now wait. This is a question: Did Mr. Rupprecht put your mind at rest on the subject of working out a system of technical cooperation?—A. Also, yes.

Q. And when you got back to Europe did Mr. Rupprecht write you and tell you he was in complete disagreement with you on that subject?—A. Yes.

Q. And did you ever write one word to Mr. Rupprecht from then to this day on the subject of territorial quotas?—A. No. I wrote to Mr. Chase explaining the whole situation.

Q. What letter is that?—A. What letter is what?

Q. You volunteered here. I did not ask you, but you volunteered you wrote to Mr. Chase explaining the whole situation?—A. Yes.

Q. What letter do you refer to?—A. I have this letter and I will ask Mr. Dixon—

Mr. WHITNEY. Let us have it.

Q. You have given all your files to the Government, have you?—A. (No answer.)

Mr. WHITNEY. Wouldn't you like him to look at his own letters?

Mr. DIXON. Which one do you want?

Mr. WHITNEY. It is the one to which he just
2587 referred.

The WITNESS. You have it.

Q. When I asked you whether you had given all your files to the Government you nodded your head. Do you agree you have given all your files to the Government?

The COURT. Have you turned over all your files to the Government?

The WITNESS. No, it is not complete.

The COURT. You gave them some things?

The WITNESS. Yes.

By Mr. WHITNEY:

Q. They read them, and you gave them what they wanted, is that right? They read them and you gave them what they wanted? Is that right?—A. I don't know. It was done in France, not here, and I was here.

Mr. WHITNEY. What he said, Mr. Dixon, was that he had written a letter to Mr. Chase which explained the whole situation.

Mr. GESELL. Why don't you let him pick it out? He can find it in the file.

The COURT. While we are looking for the letter, Mr. Webster, will you conclude with your cross examination if you have anything further. I would be brief. All you gentlemen have had two chances now.

2588 Re-cross-examination by Mr. WEBSTER:

Q. Dr. Blumenfeld, will you look at the memorandum attached to that letter again?—A. Yes.

Q. Now the subject of the memorandum attached to the exhibit, 534, had been the subject also of the conference in Paris in 1931, had it not?—A. Yes.

Q. And it had also been the subject of many discussions in Europe between 1931 and 1933?—A. Yes.

Q. And indeed the items on that memorandum attached to that exhibit are the items which were in fact covered in the Contract of Four, Contract of Six and the contract of deliveries and the Aussig contract?—A. Yes.

Q. And what you were really doing when you talked to Mr. Beschorman, and then subsequently made this memorandum in French, which Mr. Chase delivered to Mr. Beschorman, was to summarize the matters which had been agreed upon— A. Absolutely.

Q. —for inclusion in the Contract of Four, the Con-

tract of Six, the contract of deliveries and the Aussig agreement?—A. Yes.

Q. Is that not true?—A. Yes.

Q. That is true?—A. That is true.

Mr. WEBSTER. No more questions.

Mr. WHITNEY. I could save time by asking Mr. Dixon on the record if he will give me the access to the
2589 Blumenfeld files and waive the necessity of a notice to produce.

Mr. DIXON. These are Government files, your Honor.

Mr. WHITNEY. We will give you a notice to produce.

Mr. DIXON. What was the letter you wanted principally. This is a list, I might say for the record, of those produced by the Government officials from Paris after the re-entry of the American forces into that territory and is a partial summary of what files we found, and the summary is available to the Court.

Mr. WHITNEY. We will give you a notice to produce.

The COURT. Nothing is available to the Court until it is available to counsel.

Mr. WHITNEY. We are only trying to get at the truth here.

The COURT. Certain courts have made a decision on that question within the last two years.

Mr. WHITNEY. Yes. They have even granted a bill of discovery in advance of trial.

Of course if the Government comes forward and says a given document must be kept secret for the sake of secrecy, that is a different matter.

The COURT. No such suggestion has been made yet.

Mr. DIXON. Not at all, your Honor.

2590 The COURT. I will pass on that question when, as and if we get there.

Mr. DIXON. You can see the summary of the documents, Mr. Whitney, if you will come here and look at it. He referred to a letter which we do not find, or at least which was not in the file.

Mr. WHITNEY. Would the stenographer read my last question to Mr. Blumenfeld?

The COURT. I remember it. He does not have to read it.

Mr. WHITNEY. He said he wrote a letter to Mr. Chase covering the whole matter.

Mr. DIXON. But I said we do not think we have had it and I submitted a list of documents which proved we do not have it.

By Mr. WHITNEY:

Q. Dr. Blumenfeld, do you have reference to a letter of November 10, 1933, in which you set out two conflicting opinions of Mr. Rupprecht and Dr. Blumenfeld on the obligations and rights resulting for Krebs and for the Terres Rares on the exchange of information, underlining the fact that the position taken by Mr. Rupprecht in connection with the conference of August 18, 1931, as to which, "See the memorandum of that conference," and his present position are clearly contradictory? Is that the 2591 letter to which you have reference?—A. Yes.

Q. And that is the letter that covers the whole subject matter, is it?—A. I beg your pardon?

Q. And that is the letter in which you set forth to Mr. Chase the whole subject matter, is it?—A. Yes.

Mr. DIXON. Of what, your Honor?

The COURT. You are excused.

Mr. DIXON. I did not want any misunderstanding.

The COURT. There is not going to be any misunderstanding. We have only one juror here.

Mr. WHITNEY. Of course I accept any writing, but I find not one solitary word here of what the case is about. It always comes down to that other subject whenever you get a writing of any kind from him as well as others.

(Witness excused.)

The COURT. Are you calling another witness or are we going to resume the exhibits?

Mr. DIXON. I will call Mr. Corddry, your Honor, of National Lead Company.

2592 GRAHAM W. CORDDRY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. DIXON:

Q. Will you state your address, Mr. Corddry?—A. 217 North Mountain Avenue, Montclair, New Jersey.

Q. And what is your position?—A. General sales manager of the Titanium Pigment Corporation.

Q. Of the National Lead Company?—A. Of the National Lead Company.

Q. And you are appearing pursuant to a subpoena to produce the records of the National Lead Company or any of its subsidiaries engaged in the titanium pigment business in the United States with reference to the exports, if any, of the National Lead Company, or any of its United

States subsidiaries engaged in the manufacture of titanium pigments in the United States?—A. Yes.

Q. Do you have such records with you?

Mr. WEBSTER. Just a minor correction. These records were produced pursuant to item No. 24 on the subpoena duces tecum, and Mr. Corddry has appeared here at Mr. Dixon's request without a subpoena.

Mr. DIXON. That is right.

The COURT. The record will stand corrected to that extent.

2593 Q. Will you examine the records, Mr. Corddry, and state, if you will, whether they show any exports by the National Lead or the Titanium Pigment Company, or any other National Lead subsidiary operating in the United States and engaged in the titanium pigment business, to any country outside of North and South America from the years 1928 up to the present time?—A. Yes, they do.

Q. Will you state to the Court to what countries those exports were made and what your records show was the consignee of those exports?

The COURT. 1928 to date?

Mr. DIXON. Right.

A. This is quite a long drawn out job.

Q. Maybe I can simplify it this way: do your records show generally any exports from the United States prior to the outbreak of the war in 1939, made at the request of anyone other than Titan, Inc.?

The COURT. I do not understand the question. You have two conditions, and I don't know whether they are mutually exclusive or are to be read in the conjunctive, or whether it is you want to know whether there were exports prior to the fall of 1939, or whether there were exports prior to 1939; other than exports initiated by one of the Titan companies?

Mr. DIXON. The latter, your Honor.

2594 The COURT. Suppose we get the former first.

By the COURT:

Q. Have you any exports between 1928 and 1939? Let us get that.—A. We show exports in 1935 to Frederickstadt, Norway, and in 1936 the same country; in 1938 we show exports to Holland.

Q. Nothing in 1937?—A. And in 1937 also to Norway; and in 1938 to Holland and Belgium.

By Mr. DIXON:

Q. And 1939, prior to say September 1, 1939.—A. In

1939 we show a shipment in February of 1939 to Rotterdam; one in February to Belgium, and another shipment in May to Rotterdam; in June to Rotterdam; and the shipments after that date are September forward. They were made for the account of Titan Co. A/S.

The COURT. Now you want to put your question as to the second part. Will you go back to 1935. Is that the first export you have reflected after 1928? Is that correct?

The WITNESS. That is correct as regards shipments for the account of Titan Co. A/S.

The COURT. Anybody's account.

The WITNESS. Then, I would have to examine all of these original records.

Mr. WEBSTER. Just take your time.

2595 The WITNESS. This is outside of the Western Hemisphere?

Mr. DIXON. That is right.

Mr. WEBSTER. I think perhaps it ought to appear that the witness is reading from Plaintiff's Exhibit 37 for identification which was produced during one of the early days of the trial.

The WITNESS. The record shows shipments to England in 1934, 1935, 1936 and 1937. This is prior to 1939?

Mr. DIXON. That is right.

The WITNESS. And that is all.

By the COURT:

Q. Let me see if I understand you correctly: the shipments in 1935 to Norway were for the account of Titan Company—which one?—A. Titan A/S.

Q. And 1936 and 1937 the same thing?—A. Yes.

Q. And the shipment in 1938 to Holland?—A. Yes.

Q. For Titan A/S?—A. Titan Co. A/S.

Q. How about the Belgium shipment?—A. For the account of Titan Co. A/S.

Q. And in 1939 for Holland?—A. For the account of Titan Co. A/S.

Q. And the 1939 shipments to Belgium?—A. That is still the same company.

2596 Q. And the English shipments of 1934, for what account were they?—A. British Titan Products.

Q. BTP?—A. BTP.

Q. Does that apply to 1935, 1936 and 1937?—A. Yes.

Q. And for the account of BTP?—A. Yes, sir.

The COURT. All right.

By Mr. DIXON:

Q. That includes all of your records of exports during that period of time, namely, from 1928 up to September of 1939?—A. Right.

Q. Now will you state to the Court what your records show with reference to shipments outside of the Western Hemisphere after September, 1939, with particular reference as to whether they were for the account of any of the Titan associated companies, namely TG, BTP or Titan Co., Inc.

The COURT. After the outbreak of the war to date?

Mr. DIXON. That is right.

Mr. WEBSTER. Is September 1939 the deadline on this; the dividing line?

The COURT. I suppose so, because the war broke out about the first day or two of September.

Mr. WEBSTER. If there is anything after September, 1939, is what they are asking for; shipments outside of the United States outside of the Western Hemisphere, in or after September 1939.

The WITNESS. Right. Shipments were made in September and October to Frederikstad and Gottenberg and to Potsdam.

Q. Have you any records showing for whose account they were shipped?—A. They were shipped for Titan Co. A/S.

Mr. WEBSTER. I did not suppose you could get a freight boat into Potsdam. I have been down on the Harvel on a river boat.

The COURT. The point of consignment may not necessarily be a harbor.

Mr. WEBSTER. These are all, I think, consigned to harbors on his cards.

Q. Will you continue, Mr. Corddry.—A. In 1940 shipments were made for the account of Titan Co. A/S to Batavia. I cannot read these ports or the points of shipment on these shipments. It is written in ink and I cannot decipher them.

Mr. WEBSTER. They appear to be ports in the Dutch East Indies, but I agree with the witness. I cannot pronounce the words even if I can't read them.

The COURT. Were they for the Dutch East Indies?

The WITNESS. I do not know.

Q. In any event, will you state to the Court for whose

account the shipments were made?—A: Titan A/S.
2598 In 1941 shipments were made for the account of Titan A/S and we have Borneo, Sumatra and Batavia; that is two or three shipments for Batavia.

Q. But all the exports shown by your records during that year, for 1941, were outside of the Western Hemisphere and were for the account of Titan A/S?

Mr. WEBSTER. Oh, no, he has a lot more cards there.

The COURT. How about 1942?

The WITNESS. Shipments were made in 1942 and in 1943 for the account of Titan Co. A/S. Again there is a shipment for Batavia. There are two shipments for Iceland.

The COURT. In 1942 to Batavia?

The WITNESS. Yes, your Honor. In 1941 there is a shipment for Batavia. It says Batavia and also says Reykjavik, Iceland. No shipments in 1944.

The COURT. 1945?

The WITNESS. No shipments in 1945.

The COURT. Now other than Titan A/S.

The WITNESS. We show shipments for the account of BTP in 1940, 1941, 1942, 1943 and 1944.

The COURT. Any others?

The WITNESS. We show shipments in 1939 and 1940 to the British Celanese Corporation made for the account of BTP. We show a shipment in 1944 for the account of the New Zealand Supply Mission; ordered by the New Zealand Supply Mission.

The COURT. For whose account?

The WITNESS. I think that was made for our own account. That is mandatory by priority order, the priority being issued by the War Production Board.

Mr. WEBSTER. Two or three of these others you refer to also were mandatory shipments, were they not?

The WITNESS. These show another shipment in 1944 to the United States Steel Export Company, East London, and my recollection is that it was a mandatory shipment.

There is a shipment in 1943 sold to Marine Export Corporation for Lisbon and Spain.

The COURT. For your own account?

The WITNESS. Our records do not show whether it is for our own account or some other account.

The COURT. Who served Portugal and Spain, I.G.?

The WITNESS. I do not know.

Mr. DIXON. It would have been IG's territory. That

concludes your records of all the exports made during the period in question, Mr. Corddry?

The WITNESS. Yes, they do.

Mr. DIXON. That is all.

2600 Cross-examination by Mr. WEBSTER:

Mr. Corddry, there is no mystery about these shipments, is there?—A. No mystery.

Q. You endeavored after September, 1939, to make shipments so far as your capacity would permit to people that made that request for BTP?—A. Yes.

Mr. WEBSTER. That is all.

The COURT. Mr. Whitney, are there any questions?

Mr. WHITNEY. No, your Honor.

2601 CHARLES F. KAEGBEHN, resumed the stand.

Mr. DIXON. I have a few questions with this witness. I don't know whether your Honor wants to start before recess or not.

The COURT. We will take a short recess.

(Short recess.)

Direct examination by Mr. DIXON:

Q. Mr. Kaegbehn, I will hand you what has been previously marked for identification as Plaintiff's Exhibit 5 and ask you if those two charts were prepared by you?—A. The originals were.

Q. Of which these are photostats?—A. Yes.

Q. Do those charts correctly represent the stock ownership or interest of the National Lead Company and associated companies in the various companies named on the chart, together with the various agreements shown on said chart as of June 1, 1942?

Mr. WEBSTER. Your Honor, I have an objection to that. In the first place the ownership is covered in the answer to the complaint; the nature and extent of the ownership is averred or admitted in our answer to the Government's complaint.

The COURT. Does it correspond to the chart? Or is there a difference between them?

2602 Mr. WEBSTER. And also the agreements, the material agreements, are likewise admitted in the answer. Now, I have not looked at this chart recently, but I think there are some additions. It seems to me that our answer may be taken as a correct statement of the facts shown on the chart.

The COURT. Of course, I can't ask the plaintiff to accept the defendants' answer with respect to a statement of fact unless the plaintiff chooses to treat it as an admission. Here apparently he does not choose so to treat it, but is proceeding to prove in his own way.

Mr. DIXON. The question is also directed to the date of the chart June 1, 1942.

Mr. WEBSTER. These are admissions—

The COURT. Yes, they are admissions, but the plaintiff is not bound by the admissions of the defendant.

Mr. WEBSTER. I suppose he could have Mr. Kaegbehn disavow the admissions or testify that there were errors in the answer, but the only reason for my objection is that I think it tends to confuse us rather than to assist us to have in evidence a chart which will be referred to hereafter as if it were the Bible on this subject, whereas the material that went into the answer represented a somewhat more thoughtful attempt to state the facts.

The COURT. Well, Mr. Dixon, do you want to take the facts as they are set forth in the answer?

2603 Mr. DIXON. It was my thought, your Honor, that this chart prepared by Mr. Kaegbehn completely covers the material which would take considerable reading to get from parts of the answer. There is a difference in some respects in the answer from the material shown on the chart, and my question to Mr. Kaegbehn is whether that correctly represents the subject shown on the chart and at the date it was made.

The COURT. That is June 1, 1942?

Mr. DIXON. June 1, 1942.

The COURT. Well, your offer apparently is not well received, and that is all it can be—an offer on your part merely that this is an admissible statement, and I must have to receive it, even if it creates confusion.

Mr. WEBSTER. Well, I have two or three questions about it that I will ask.

The COURT. Is it a correct statement?

The WITNESS. Substantially correct in the major aspects as I understand it, as of that date.

The COURT. All right. Are you offering it in evidence?

Mr. DIXON. We offer it in evidence.

The COURT. Plaintiff's Exhibit 5 is received in evidence.

(Plaintiff's Exhibit 5 for identification received
2604 in evidence.)

Q. Now directing your attention, Mr. Kaegbehn, to 1934 and 1935, you were at that time, as I recall it, in

the patent department or division of the National Lead Company? A. No, sir.

Q. What was your position at that time, if you will refresh my recollection?

The COURT. 1934.

A. Secretary to the patent committee of the Titanium Pigment Company.

Q. Were you connected or associated with the negotiations in any way of the Zirconium contract by National Lead and the American Zirconium Corporation at that time?—A. Yes, and particularly more closely as it pertained to the patent aspects.

Q. That was in connection with Mr. Beschorman, the negotiation of that contract with American Zirconium Corporation?—A. Yes.

Q. Do you know whether Mr. Beschorman consulted with any other officers or employees of the du Pont Company at any time prior to the issuance of the license by National Lead to American Zirconium Corporation?

Mr. WHITNEY. That is objected to because the answer would be immaterial; if he did know it it still would not be admissible.

2605 The COURT. You will have to read the question. (Question read.)

Q. (Continued) Or of the Krebs Pigment & Color Corporation.

Mr. WEBSTER. I think it is still objectionable.

The COURT. On what ground?

Mr. WEBSTER. Because the fact that he consulted with him would not have anything to do with this question.

The COURT. That is true, but I will allow the question for whatever it is worth.

Do you know whether Mr. Beschorman consulted or communicated with the officers of Krebs—is that the question?

Mr. DIXON. Krebs Pigment & Color Corporation; yes.

The COURT. (Continuing) —at or about the time that the Zirconium contract was under negotiation?

That would not permit me to infer, I will tell you now, that they discussed it with respect to the Zirconium, unless he knows.

What is the answer to the first question?

The WITNESS. No, sir.

The COURT. You don't know?

The WITNESS. No, sir.

The COURT. That clears it up.

2606 Q. Now do you recall, Mr. Kaegebehn, having any —or having stated at any time that you believed that Mr. Beschorman did consult with any officials of the du Pont Company or Krebs Company while these negotiations were pending?

Mr. WHITNEY. That is certainly objected to, your Honor. He is cross-examining his witness as to a subject—

The COURT. He may refresh his recollection.

Mr. WHITNEY. (Continuing) —which if testified would be pure hearsay.

The COURT. No. I will allow it.

The WITNESS. May I have the question?

(Question read.)

A. No, sir.

Q. Do you recall this question having been put to you, Mr. Kaegebehn, before the grand jury, as follows:

“Q.”—

The COURT. Now there you will have to pause. So far he has been your witness and so far I have not been given any basis for the inference that he is anything but a willing and not hostile witness. If you want to claim and treat him as a hostile witness and impeach him, why, you will have to tell me on what you base it.

Mr. DIXON. Your Honor, this witness of course was called as an officer of Titan Company, Inc. under
2607 the rules, and we do not for that reason regard him as a Government witness in the ordinary sense.

The COURT. In other words, you think he ought to be treated to some extent at least as a hostile witness?

Mr. DIXON. Correct, your Honor.

The COURT. All right. Is there objection to the question?

Mr. WEBSTER. Well, I object to the question and I suggest that the witness first be given an opportunity to refresh his recollection.

The COURT. I was going to suggest that.

Mr. WEBSTER. That is, by being shown what may appear to be the testimony given before a grand jury.

The COURT. He does not have to be shown, but I would suggest that you frame for the present your question in the form—this is a suggestion; you don't have to take it—of whether or not the question and answer you are about to read him, which you suggest was given to the grand jury was so given, and, if so, whether it refreshes his recollection. That would not constitute impeachment.

Mr. DIXON. Thank you, your Honor.

Q. Do you recall, Mr. Kaegelhelm, whether the following question was asked and this answer given by you in testifying before the grand jury:

"Q. Do you know whether Mr. Beschorman contacted with any other official of the du Pont Company at any time prior to the issuance of a license by National Lead or du Pont Company?" and that you answered: "I believe he did."—A. I remember the subject of the American Zirconium license having been discussed in the grand jury proceedings. I don't recall that precise question or that answer.

Q. Would you now say that having had that question put to you and assuming that it was asked you and that your answer was as given before the grand jury that you might have made that answer at that time?—A. Yes.

Q. Now does that refresh your recollection any as to whether or not you did make such an answer?—A. I think it likely that I did.

By the COURT:

Q. Do you desire to change your testimony that you gave today on that subject?—A. As I understood Mr. Dixon's question he asked me whether Mr. Beschorman had gotten in touch with—

Q. Or communicated with. It doesn't make any difference who got in touch with whom.—A. I have a recollection of being present at one conference in which Mr. Beschorman and Mr. Rupprecht conferred in Mr. Beschorman's office, and I was there—

Q. About Zirconium?—A. Yes, sir. It was a subject of their conversation.

2609 By Mr. DIXON:

Q. And that was before National Lead Company entered into the license agreement with American Zirconium?—A. To the best of my recollection it was after the Krebs agreement with Zirconium and prior to ours.

Q. Do you recall what was discussed at that conference at which you were present and in which Mr. Rupprecht and Mr. Beschorman were also present discussing the license?—A. Well, as I recall the circumstances of that meeting, I was asked to advise Mr. Beschorman what my opinion was of the patents which American Zirconium were infringing. I did so. And then there was some conversation and I was excused.

Q. Were there any other times that you know of that

this proposed license agreement from National Lead Company was discussed with Mr. Rupprecht?—A. Not now, sir; I don't recall any.

Q. Now, directing your attention to the Virginia Chemical license agreement already in evidence from the du Pont Company to the Virginia Chemical Company, do you recall, or know whether any notice was sent by the National Lead Company to Virginia Chemical Company about alleged infringement of National Lead's patents?

Mr. WEBSTER. I object to the form of that question, because this witness comes from a company that 2610 had no license agreement with Virginia Chemical.

The COURT. Counsel wants to know whether the company which employs him ever complained to Virginia Chemical of infringement by Virginia Chemical of National Lead patents.

Do you know of any such?

The WITNESS. Yes, sir.

The COURT. The answer is Yes. Go ahead.

Q. Do you recall when the notice was sent to Virginia Chemical Company by National Lead?—A. It was the latter part of 1934 is my best guess at this time.

Q. Do you know when any notice was sent by Krebs or du Pont Company to Virginia Chemical for any alleged infringement of their patents?—A. No, sir.

The COURT. You never litigated with Virginia Chemical, did you?

The WITNESS. No, sir.

Q. Do you recall this question being asked you, Mr. Kaeggebehn, before the grand jury and your answer to that question as follows:

“Q. Subsequently the National Lead Company called the attention of the Virginia Chemical to the fact that they were infringing National Lead patents?” and your answer was “Yes.” Do you recall that question?—

A. Well, not specifically, but I do remember the 2611 subject having been brought up, in the grand jury proceedings.

Q. Then immediately thereafter do you recall this question and answer:

“Q. And the du Pont Company did the same?” and your answer “Yes.” Do you recall such a question and answer at that time?—A. No, sir.

Q. Well, assuming it to have been asked you and your answer given as follows, does that refresh your recollection as to whether you did give such an answer at that time?—A. No, it does not.

Mr. WEBSTER. I understood your Honor's suggestion was to refresh his recollection as to what he did do in connection with this subject matter.

The COURT. Well, we have a negative answer, so we really aren't any place at all.

The WITNESS. Your Honor, I am not clear. We were talking about American Zirconium—

The COURT. No. We are talking about Virginia Chemical.

2612 Q. Do you understand my question, Mr. Kaeg-behn?—A. I beg your pardon, Mr. Dixon. When I replied and I tried to fix it for you I was under the impression I was testifying as to when we sent a notice to American Zirconium.

Q. That is right. Then I asked you—

The COURT. No, no. The notice was in reference to Virginia Chemical.

Mr. DIXON. That is right.

The COURT. You gave us a date of I think 1934. You said it was your best guess.

The WITNESS. I am in error about that.

The COURT. You are in error about that? You want to withdraw it?

The WITNESS. Yes, sir.

The COURT. Will you frame the question again and see if we can get some date on Virginia Chemical.

Q. Do you recall, Mr. Kaegbehn, when any notice of alleged infringement was sent to the Virginia Chemical Company by the National Lead Company or given to Virginia Chemical by National Lead Company?—A. I would fix that as later than 1934, but I am not at all clear on when such notice was sent.

By the COURT:

Q. But there was a notice sent from National Lead to Virginia Chemical?—A. That is correct.

2613 Q. Then I asked you the question whether you ever litigated with Virginia Chemical, and you answered in the negative.—A. And that would be the same.

Q. You still say that?—A. Yes, sir.

By Mr. Dixon:

Q. Do you know whether the du Pont Company sent any notice to the Virginia Chemical Company for alleged infringement of patents?—A. No, sir.

Q. Do you recall this question having been asked you and your answer as follows—

Mr. WHITNEY. If your Honor please, this is impeachment on a collateral matter because it is already in evidence that du Pont sent notice.

The COURT. It is in evidence that du Pont sent a notice?

Mr. WHITNEY. Yes. The notice is in evidence and has been discussed.

The COURT. All right.

Mr. DIXON. I am directing the witness's attention as to whether they knew that notice had been sent.

The COURT. I will let you put that question, whether he did know that du Pont sent such a notice to Virginia Chemical.

The WITNESS. No, sir, I did not.

The COURT. And the references which have been 2614 read from the alleged minutes of a grand jury proceeding do not refresh your recollection to the contrary?

The WITNESS. No, sir.

Q. Did you know when a license was granted by du Pont to the Virginia Chemical Company?—A. I didn't know when.

Q. Did you know that there was a license granted to them?—A. Yes.

Mr. DIXON. That is all.

The COURT. Mr. Webster.

Mr. WEBSTER. I just wanted to ask one or two questions about the chart.

Cross examination by Mr. WEBSTER:

Q. Mr. Kaagebehn, that chart was prepared when the Department of Justice representatives were in the office of the Lead Company examining the files, was it not?—A. Just prior to it.

Q. And it was intended to help to straighten out the corporate relationship for them?—A. That is correct.

Q. And there have been some changes in the situation since then, have there not?—A. Yes, sir.

Q. There has been a change, has there not, with reference to the ownership by the Lead Company of stock in Titan Company, Inc.?—A. Yes, sir.

Q. And that should be 100 per cent instead of 87 per cent, should it not?—A. Yes, it should be as of today.

2615 Mr. DIXON. If the Court please, I asked the question on the chart as of the date of the chart.

The COURT. He is not impeaching the witness on the chart; he is supplementing.

Mr. DIXON. All right.

Q. Now, also, there is a reference here to the ownership by the Lead Company of stock in the American Zirconium Corporation. Has that been changed since the date the chart was made?—A. Yes, sir.

Q. What changes have been made in that?—A. We have parted with ownership of 10 per cent.

Q. You have returned that 10 per cent to the American Zirconium Corporation, have you not?—A. I believe to the Glidden Company.

Q. Do you notice any other changes in here at the moment, any other material changes?—A. No.

Mr. WHITNEY. Just to clear two things up, your Honor.

Cross examination by Mr. WHITNEY:

Q. Mr. Kaegebehn, did I understand you to say that you recalled a meeting between Mr. Beschorman and Mr. Rupprecht at which you were present after the Krebs license agreement to Zirconium and before the National Lead license agreement?—A. That is what I said.

Q. Well, the record shows that the National Lead 2616 agreement was executed May 6, 1935, that is Exhibit H, and that the Krebs license agreement was executed August 19, 1935, that is Exhibit I. So, there hadn't been any time after the Krebs agreement and before the National Lead, and it is possible your memory may have been in error therefore?—A. That is right, quite possible.

Q. Another minor matter: With reference to your testimony about the Virginia Chemical, the notice from du Pont to Virginia Chemical is in evidence and has been discussed here, as Government's Exhibit 412, that is November 19, 1936; and there is in evidence a conference at which no du Pont representative was present but at which were present eight gentlemen, including yourself, representing various National Lead and various Virginia Chemical interests, on May 21, 1937, Exhibit 421. You have no reason to doubt the accuracy of those documentary exhibits, have you, as to date or the subject matter?—A. No, sir.

Mr. WHITNEY. Thank you.

Redirect examination by Mr. DIXON:

Q. Just one more question, Mr. Kaegebehn. When you were called in by Mr. Beschorman when Mr. Rupprecht was there to discuss the Zirconium patents, then it might have

been before the license was granted by du Pont to the American Zirconium Corporation, is that correct?—A. It might have been.

2617 Mr. DIXON. That is all.

Re-cross-examination by Mr. WHITNEY:

- Q. But at that time it certainly was after the National Lead agreement then, was it?—A. I couldn't fix it that closely, Mr. Whitney.

Q. Well, the Krebs agreement was August 19th. Now, you earlier testified that it was between the two agreements.—A. No, I said I thought it was subsequent to the execution of the Krebs agreement and prior to ours. That would have fixed it before May. I was laboring under the erroneous impression that the du Pont agreement had been executed earlier.

Q. What time of year was it?—A. It was spring. I at that time was stationed in the Brooklyn laboratory and had a phone call from Mr. Beschorman's secretary to come over to his office, he wanted to ask me some questions.

Q. You remember it was in the spring?—A. Yes, sir.

Q. You are aware, are you not, that National Lead acquired 10 per cent of the stock of Zirconium and Mr. Beschorman went on the board?—A. Yes, sir.

Q. And the subject matter of this discussion was Zirconium's patents, was it?—A. Well, that was the subject matter to the extent I participated in the conversation.

Mr. WHITNEY. Thank you.

The COURT. You are excused.

2618 SAMUEL W. PITTS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. DIXON:

Q. What is your present address, Mr. Pitts?—A. My home address is 333 East 43rd Street. My business address room 513, Custom House.

Q. By whom are you employed?—A. By the United States Tariff Commission.

Q. What is your position with that Commission?—A. Chief of the New York office.

Q. I have asked you previously to determine if you can from your records, the records of the Tariff Commission, what imports, if any, those records show of titanium pigments into the United States from the year 1928 to the present time. Have you made such a check?—A. I have.

Q. Will you state to the Court what you found from the records as the result of that check, made by you from the official records?—A. I found that titanium pigments were not separately classified up to January 1, 1935. They were included in what we call the catch-all clauses of the Tariff Act, or basket clauses, and it was quite an impossible job to pick out of those basket clauses the titanium pigment items.

However, they were separately classified in 1935.
2619 And we find that in 1935 there are no imports of titanium dioxide or titanium white. In 1936 the total values were \$3095. In 1937 \$325. In 1938 \$1303. 1939 \$332.

There have been no imports since, with the possible exception of an item valued at \$10 which was in July at the Port of Detroit, in July 1942, valued at \$10 only.

Q. As understand it, you do not have the records with you showing the shipper or the consignee of the imports that you have referred to and described?—A. Not all of them. I have some of them.

Q. Can you state to the Court who the consignee was and who the shipper was on such imports as you are able to describe to the Court from your records, where that information is available?—A. The item of \$3095 imported in the year 1936 was one single item at the Port of New York, consigned to the National Lead Company.

Q. Do your records show who the shipper was?—A. Yes, sir.

Q. Will you state to the Court what they show?—A. It was from the British Titan Products Company, Ltd. of Bellingham, England.

Q. What do your records show with reference to the imports of 1937?—A. 1937, that was entered at the Port of Norfolk, and the document, the Customs document had been destroyed for that period.

Q. Do you have any record of any of the imports
2620 in 1937 to indicate the source of the shipment into the United States?—A. 1937?

Q. Yes, that is right.—A. From information we obtained in 1938 it is fair I think to assume that—

Mr. WEBSTER. I object to that.

The COURT. Objection sustained.

Q. Do you have any records showing the source of the other imports for the year 1938?—A. Yes.

Q. Will you state to the Court, if you have such records, who the shipper was and who the consignee was?—A. One

of the items was entered on April 15, 1938 at the Port of New York, consigned to the American Enka Corporation at Enka, North Carolina, and the papers indicated that Enka was close to Asheville. It was shipped by Peter Schoen & Zoehne, Ltd.

Q. From what country?—A. From Holland.

Q. Do you have a record of any of the other shipments?

—A. There was another shipment of January 8, 1938 which was practically a duplicate, consigned to the same people, valued, however, at \$331 instead of \$330.

Q. Is that all of the shipments or imports into the United States during that year that you have a record of the shipper and consignee, Mr. Pitts?—A. Yes, sir, that is all I have for that year. There were two other entries of that same year entered at Norfolk, but those documents we tried to obtain and they had been destroyed.

2621 The COURT. 1939.

The WITNESS. One of those items—there were two items in 1939, one valued at \$40 entered at the Port of Detroit; another item valued at \$292 at the Port of Norfolk, which documents—the Norfolk documents having been destroyed; not obtainable. We did not check the Detroit item.

The COURT. 1940.

The WITNESS. Nothing in 1940, sir. Nothing since then.

The COURT. All right.

Mr. Dixon. That is all.

Cross examination by Mr. WEBSTER:

Q. Mr. Pitts, do you have in your possession all the records relating to shipments into the United States of pigments and other articles?—A. No, sir.

Q. Well, does the Tariff Commission undertake— A. Pardon me, maybe I did not understand your question.

The COURT. The question asked you was whether you had all the Customs records of the United States in your pocket.

The WITNESS. No, sir.

Q. Well, does the Tariff Commission undertake to maintain custody, possession, of all shipments into the United States on which tariff is payable?—A. No, sir.

2622 Q. I was just wondering how is it you happen to have these records relating to titanium pigments.

—A. As a matter of fact, we deal in all commodities. You asked me if I had the records. We don't have the records.

We obtain the information from customers' records of all imports into the United States, including pigments.

Q. So, in respect of these matters that you have mentioned here, you simply made a search of the Customs records for the purpose of obtaining this information for Mr. Dixon; is that what it is?—A. Yes.

Q. You referred to the values. Are those the values that are placed on the shipment by the shipper and on which customs are paid?—A. As a rule the values are always placed by the shipper subject to approval by the Customs authorities.

Q. That is what you were referring to when you gave the values for those various years?—A. Yes. Those values passed the Customs inspectors.

Cross examination by Mr. WHITNEY:

Q. Mr. Pitts, is the tariff 15 per cent ad valorem on titanium pigments?—A. I don't know, frankly. I am not particularly interested in tariff rates. That is, this particular office is not.

Q. I mean through this period that you have been testifying about.—A. I couldn't answer that. I don't know.

Q. You don't know what the rate is?—A. I don't know what the rate is.

Mr. WEBSTER. May I look at Mr. Pitts's notes for a minute?

Mr. DIXON. Surely.

Mr. WEBSTER. No questions.

The COURT. You are excused, Mr. Pitts.

(Witness excused.)

2693

AFTERNOON SESSION

LOUIS EDWARD BARTON, called as a witness on behalf of defendant National Lead Company, being first duly sworn, testified as follows:

Direct examination by Mr. WEBSTER:

Q. Mr. Barton, when were you born?—A. 1872.

Q. Where do you reside?—A. At Windsor, Connecticut.

Q. What is your profession?—A. Chemist.

Q. You are now retired?—A. Well, practically, I should say. I have not been very active, but I do carry on certain work of my own at the present time in a technical way, research work of my own.

Q. Do you have any present official connection with the

titanium industry?—A. Yes. I still am a member of the board of directors of the Titanium Pigment Corporation.

Q. And the Titanium Pigment Corporation is a subsidiary— A. Subsidiary of the National Lead Company.

Q. When did you retire from active work for the National Lead Company?—A. In the Spring of 1934.

Q. Where did you take your professional training?—A. Well, my first job was—

Q. Where did you go to college?—A. I did not attend college. My first job was with the Troy Steel Works in their laboratory and I had the opportunity at that time to get a pretty good idea of the metallurgy of iron and steel, and shortly after that I took a special course with Enrique Tonneda, who was a professor of metallurgy at the Rensselaer Polytechnic Institute.

Q. What did that course include?—A. It was a general course in chemistry, really preparatory to work that he wished to entrust to me a little later.

Q. Did he entrust you with that work under his supervision after that?—A. After I had finished that course I became his first assistant. He operated a commercial laboratory, industrial laboratory, in connection with his professorship and other duties.

Q. Did that laboratory work relate to the investigation of materials and processes for various industries?—A. For various industries. There was a great variety of work conducted in his laboratory.

Q. Largely in the field of chemistry?—A. In the field of chemistry and metallurgy.

Q. Mr. Barton, are you the author of any articles on scientific or chemical subjects?—A. Well, I have written a little. I published an article in the Journal of Industrial Engineering Chemistry some years ago relative to the determination of nitrogen in steel, and at one time I wrote a chapter annually for the Mineral Industry, and I think that Mineral Industry was published in some way in cooperation with the Engineering & Mining Journal.

Q. You said you wrote a chapter; On what subject?—A. On the subject of titanium.

Q. Were you employed by the Titanium Alloy Manufacturing Company?—A. Yes.

Q. At what time and in what capacity?—A. Well, they called me chief chemist, but as a matter of fact I conducted research work for them.

Q. When were you first employed by that company?—A. They employed me on February 1, 1912.

Q. What was the nature of your work during the early period with the Titanium Alloy Manufacturing Company?

A. Well, of course their industry consisted entirely in the manufacture of alloys, particularly what they called ferro-titanium used in the treatment of steel for deoxidizing, and there were a good many problems in connection with that, and of course our first efforts were to solve some of those problems and develop better business, if possible, but it was agreed that we should also conduct a campaign of development for new uses for titanium outside perhaps of those alloys which they had thus far been devoted to.

Q. During this period did you come in contact with a gentleman named Dr. A. J. Rossi?—A. Yes. Dr. Rossi was with the Titanium Alloy Manufacturing Company when I went with them.

Q. What was the nature of the work that he had 2696 done or was doing for that company?—A. Well,

Dr. Rossi really was the father of the titanium industry and it was due to his efforts that the Titanium Alloy Company was started.

Q. Will you explain what you mean by Dr. Rossi being the father of the industry.—A. Well, if we looked at the textbooks of that time we would find that they gave titanium just a slight reference and classed it among the rarer elements, but Dr. Rossi, and quite a good many others in different parts of the world, knew that titanium was much more abundant than the textbooks on chemistry would indicate, and Dr. Rossi particularly had had experience with the titanium used before. He was the superintendent of blast furnaces at a point in New Jersey, which I cannot recall at the moment, and he was there for a long time and he handled ores that contained titanium, and his thought was that many of the ores that are distributed throughout the world that contain large quantities of titanium, maybe up to 15 or 20 per cent, that they could also be smelted to get metallic iron and flux the titanium out with the slag with other materials that they wanted to separate.

Q. After your employment by this company did you have any—first, who was William F. Meredith?—A. William F. Meredith was the president of the Titanium Alloy Manufacturing Company.

2697 Q. After your employment by the company did you have any conversation with Mr. Meredith on the subject of titanium research?—A. Yes; before I actu-

ally undertook any work with the company we had a conversation covering the entire matter. His wish was that we develop new products. I might add here that I had had some little earlier experience in titanium while I was with Professor Touceda; and we finally decided that the first thing we should work on, in addition to the work we were doing in connection with the development of the titanium alloy department, would be the preparation of titanium oxide. I told Mr. Meredith at that time that I thought titanium oxide would make a good white pigment. That was based upon a very dim idea I had acquired during work in Touceda's laboratory. The Titanium Alloy Manufacturing Company was interested also in any titanium oxide which was reasonably pure.

Q. Was there such a thing as pure titanium oxide at that time?—A. Well, we tried to obtain such a product very diligently, but we did not find any. We could obtain from chemical houses what was called titanitic acid. This product differed very greatly, comparing the various samples we received. Some contained small amounts of sulfur trioxide, indicating perhaps they were precipitating from sulfuric acid solutions, and others were free from sulfates and perhaps were precipitated from hydrochloric acid solutions.

2698. Q. Did you have in mind at that time that if you could obtain pure titanitic oxide that that would have a general use in the industry?—A. Well, we already knew that if we could get one that was relatively pure, say, containing 90 per cent or above of titanitic oxide that it could be at once used in other processes for the manufacture of alloys, and we also recognized that there might be a field for such a product as that in other places. For instance, there was a demand even then for such a material for welding rods and I believe they first used a rutile type.

Q. Did you have in mind at that time the use of titanium pigments in paint?—A. Well, I had very definitely that in mind, but these crude products, relatively pure products you might call them, we did not expect that those would be suitable for pigments for paint because the products must be white. I spoke about those products that we purchased in the markets that were called titanitic acid. When those were calcined to remove the combined water and other volatile materials as they were never white.

Q. Will you explain to the Court what you mean by the word "calcined"?—A. Well, to my mind calcined means

the heating of a substance to either eliminate something or change its form.

Q. As I understand it when you did obtain this 2699 titanic oxide, you were unable at that time to make a pure white pigment?—A. The products that we attempted to make first we did not expect them to be white, but the product that we made that was relatively pure was a good starting point; as you might say, the raw material for the preparation of the more refined product.

Q. And while that has certain industrial value outside of the paint field, I understand your testimony to be that it would not be useful as pigment for paint?—A. Not as pigment, no.

Q. Now, did you make any use during this period of the rutile form of TiO_2 ?—A. Yes. Rutile is what the Titanium Alloy Company had relied upon up to that time for making certain alloys they had produced in relatively small quantities compared with their regular ferro titanium product which was made from ilmenite. For such special titanium alloys rutile containing about 90 per cent TiO_2 could be used:

Q. What is the difference between, the chemical difference between rutile and ilmenite?—A. Well, the chemist thinks of ilmenite as a ferrous titanate, a combination or solid solution of one molecule of ferrous oxide with a molecule of titanium oxide.

Q. And what is rutile?—A. Rutile is substantially titanium oxide. There have been found a few 2700 specimens which contain as high as 99 per cent of titanic oxide. Essentially it is a pure titanic oxide but as a matter of fact it rarely runs higher than about 90 per cent.

Q. Is rutile found in large deposits?—A. No. It occurs in many parts of the world but usually in comparatively small quantities mixed with other minerals and a great effort had been made prior to the time I went with the Alloy Company to find deposits of rutile where they could produce it cheap enough for their purpose. Those efforts had not been very successful, and the result was they wished to have developed a relatively pure titanic oxide prepared, say, from ilmenite which was very plentiful. They could then use that relatively pure titanic oxide for special purposes.

Q. Now, your interest then at that time was to find a relatively pure oxide manufactured from ilmenite, is that the case?—A. Yes.

Q. How did you go about finding that?—A. Well, of course already there were ways known of separating titanic oxide from its ores. It was known to attack the ore by sulfate of soda or fuse it with soda ash and then treat that with sulfuric acid or attack it with sulfuric acid. That was already known. After obtaining a sulfuric acid solution of titanium or hydrochloric acid solution of titanium, either one, it was well known to precipitate the titanium by hydrolysis by diluting the solution and boiling it.

Q. What do you mean by the word "hydrolysis"?—A. Well, a process of forming with the titanium a hydrated compound which will separate from the solution, leaving the acid which was formerly with the titanium in the solution.

Q. Was all this early work carried on in the laboratory?—A. Of course our first work was carried on in the laboratory.

Q. Then did you put up a plant, or a pilot plant?—A. We built a pilot plant. After working on a process in the laboratory until we had an idea of what would be needed to produce a product on a little larger scale, we equipped the pilot plant as, we hoped, adapted to produce the material we wanted. If that worked then, we could go to a still larger scale.

Q. Did you encounter any difficulties in the operation of the pilot plant?—A. Yes. That panned out as usual; we found that our guesses were wrong on construction and we had to rebuild; some of our products were very poor because they had not been properly treated in the pilot plant.

Q. Did you finally succeed in getting a relatively good product out of pilot plant operations?—A. Yes, we did. We tried more than one process in the pilot plant and we were able to make very good products; that is, when I say "very good products," I am referring now to the crude titanic oxide, that is relatively pure, that could be used by the company in their own manufacturing work and perhaps; as we did later on, sell it for ceramic work.

Q. Now, did you give any attention during this period to the manufacture either in the laboratory or in the pilot plant to a pigment known as a composite pigment?—A. Yes.

Q. Will you describe that; what sort of pigment that is and your reason for working on that?—A. Yes. We first

produced titanite oxide in relatively pure form. That was done before any work on composite pigments. We took this crude material and dissolved it in acid and then we separated any insoluble matter and precipitated the titanium by hydrolysis in a much higher state of purity. We would get perhaps 99 per cent or above, and it would be rather white in color. While that was not as good as produced today by any means, it served for the purpose of testing the material out as a pigment.

You spoke about the composite pigment. I wanted to give you an idea of the first step toward the production of this pure titanium oxide as of that date. But in carrying out that process, regardless of whether we had a hydrochloric or a sulfuric acid solution of the titanium, we had to make those solutions very dilute. Well, we could see that there would be great expense in producing a white titanium oxide in that way but we thought, on account of the exceptional hiding power of titanium 2703 oxide, that perhaps we could produce a compound that had a large amount of something else. We had an example of a commercial pigment in the market, lithopone, which has around 70 per cent we will say of barium sulfate and 30 per cent of zinc oxide. That really was a suggestion. So, we followed that up, and we made a pigment containing calcium sulfate, about 70 per cent, and titanium oxide, about 30 per cent or 25 per cent. It varied more often 75-25 at that time.

Q. I wonder if you can give us an example of the comparative cost in terms of hiding power of composite pigments and pure titanium oxide at that time?—A. Yes. As I have said before, we obtained samples of this so-called titanite acid and we calcined that and got a rather poor quality of product, discolored and so forth. We could make by our own method that I just described a minute ago, by precipitation by hydrolysis in a dilute solution, we could make a product of relatively pure titanite oxide, maybe 99.5/10 per cent, and still not a very good white pigment, but still good enough to be tried out as a pigment.

Now the products that we made in those early attempts, I think their hiding power would be about 600 to 700 tinting strength. Now we could make a composite pigment, containing 25 per cent of titanite oxide, that 2703a would have a tinting strength of 300 to 400. In other words, pretty near half as much hiding power as the pure product with about 25 per cent of tita-

nium oxide.

2704 Q. 25 per cent.—A. 25 per cent.

Q. Yes. Now when did you first begin to make tests, that is, exposure tests, and that sort of thing?—

A. Well, the exposure tests, we started those just as early as we had material that we felt was sufficiently good to make a paint test, and that occurred I think about 1913, '14 and '15. We were continually testing these products, both the composite and the pure titanium oxide.

Q. Of course during this period the Titanium Alloy Manufacturing Company was engaged chiefly in a wholly different line of business, wasn't it?—A. Yes, quite a different line of business, and a good deal of attention had to be given to that, too. But when we discovered the hiding power and the relatively good white product that we could make, we realized that there was something in the proposition to make a pigment.

Q. Were these early tests satisfactory?—A. No, they were not very satisfactory.

Q. What was the trouble?—A. The first panels we painted with titanium paint, when put out, were beautifully white, but after a little while they acquired kind of a yellowish color and sometimes they would have kind of a grayish tone. That was rather disconcerting, but we studied the problem by calcining at various temperatures and we found that a little higher temperature and a longer time of calcination would help to avoid that defect in discoloration.

2705 Q. Are you familiar with the expression "chalking"?—A. Chalking. That was another very serious difficulty with our earlier types of pigment. The calcium sulfate pigment was particularly a chalky pigment. I don't think a pure Titanox-C paint made with a pigment made at that time would endure exterior exposure for more than a year without showing the wood.

Q. By chalking, what do you refer to?—A. The chalking—well, there are differences of opinion on that. I have seen it described as a migration of the particles of pigment with the surface, and then falling off, but I have always myself attributed it to the decomposition of the vehicle itself which served to hold the pigment together and on to the surface.

Q. In any event, the effect of it is to leave the wood exposed?—A. To leave the wood exposed.

Q. Prematurely, or before it would normally occur?—A. Yes.

Q. Now tell us about your early work in connection with Titanox-A and Titanox-B. You have mentioned Titanox-C.

—A. Yes, I mentioned Titanox-C. It was the first pigment that we prepared of the composite type. We had
2706 already prepared pure titanic oxide. I call it pure, although it was not strictly pure; it was not as good a white as we needed but it was precipitated by hydrolysis and much purer than the relative pure product as a crude
* that we used in metallurgical work.

We also developed a composite pigment containing barium sulfate and titanic oxide. That we called our Titanox-B. That proved to be more resistant to exposure to the weather than the Titanox-C. The titanium oxide itself also gave a somewhat better result than Titanox-C.

Q. But that was very expensive, was it not, to use in its pure form?—A. The Titanox-B would be perhaps a little more expensive than the Titanox-C. But either one of these composite pigments would be much cheaper than the pure titanium oxide.

Q. Did you make any investigations relating to the use of titanium in connection with other pigment substances?

—A. Yes. When we found that the titanium pigments were relatively non-durable when exposed to the atmosphere, exterior paints, not very durable, we thought that it might be desirable to have a pigment that contained some white lead or zinc oxide, because we knew that white lead and zinc oxide had given better results than we had obtained with the titanium pigments. So we prepared
2707 a product of that kind.

Q. Did you take out any patents referring to white lead, the use of white lead and zinc oxide in connection with titanium pigments?—A. Yes. There were two patents. One covered the use of the lead, I think, and the other the zinc oxide.

Q. But you were not in the paint business, so you were not operating under those patents, is that right?—A. We did not operate commercially under those patents but as we had determined the greater durability of the products, we could manufacture and sell the titanium pigment and the paint manufacturer could put in the white lead and zinc oxide as required to suit his own purpose.

Q. So that while the patent was not directly useful in your business, it was useful to your customers' business?

—A. Yes.

Q. Let me ask you one or two other preliminary questions. How much of a staff did you have up there at

Niagara Falls?—A. Well, there was so much work that we increased our laboratory staff for general work quite rapidly—I can't remember just how many men we got in there within a few months, but we did get in connection with the allot department a metallögraphist and also we engaged a professor in Rensselaer Polytechnic Institute, Matthew A. Hunter. We wanted him also to assist in the 2708 metallurgical work. Dr. Hunter had prepared the first coherent mass of real metallic titanium.

Q. You mean by that he actually produced a lump of metallic titanium?—A. Metallic titanium. Perhaps I might explain that the ferro-titanium that was being manufactured at Niagara Falls; the titanium was combined with carbon. In other words, it was a mass of iron, which distributed throughout the mass small particles of titanium carbide. Now, the product that Dr. Hunter made was titanium, not titanium carbide.

Q. And that was the first time that had been done?—A. He was the first one that made it in coherent form. There was another investigator earlier than Hunter that made a powdered product that he said was metallic titanium.

Q. Just a minute. That work of Dr. Hunter's related to the other phase of the business of the Alloy Company?—A. Yes, the alloy business.

Q. Did you have anybody working with you in the pigment field?—A. Yes. We engaged Mr. Henry A. Gardner who was then and still is the director of the scientific section of the Paint, Lacquer and Varnish Association, with headquarters in Washington.

Q. Was his experience such as to indicate to you that it would be useful in your development work?—A. He knew much more about paint of course than we did. 2709 He had had experience in every field and we thought that his suggestions as to the methods of applying the pigment and the various purposes for which the pigment could be used would be very useful.

Q. During this research and pilot plant work that you have described—if I may ask a leading question—none of this product was commercially profitable?—A. No. During that pilot plant work we simply made enough material so that if a customer was interested in it, he wanted to find out what it was, we would let him have a sample, give it to him, in order that there might possibly be developed a demand a little later on when we might be in a position to produce it in commercial quantities.

Q. During this period that you are describing, did you

make application for patents?—A. Yes. As soon as we were assured that we had a process that was reasonably successful and appeared as if it might be successful in commercial operations, we took out a patent.

Q. Were those patents related to the work that you were doing up there at Niagara Falls?—A. Yes, they were related. We sometimes would take out a patent, thinking perhaps that that would be something we would use commercially, but a little later on we developed something else that perhaps looked as if it would be cheaper or better, and then of course we would naturally set the other aside, although we had applied for a patent or taken a patent.

2710 Q. You could not always tell at the time an application was made whether the patent would prove to be commercially useful or valuable or not?—A. No, we could not tell for sure just what we might do because we were constantly experimenting to find better ways.

Q. Mr. Barton, have you at my request prepared an abstract of patents in which you are named either as an inventor or co-inventor?—A. Yes.

Mr. WEBSTER. May I have this marked, please.

(Marked Defendant NL Exhibit 2 for identification.)

Q. Mr. Barton, I show you a document, NL 2^d for identification, and ask you if that is the abstract of your patents, that is, patents in which you appear either as the inventor or as the co-inventor?—A. Yes. I recognize this abstract of patents. I might explain that perhaps if I had known how you wanted to use this, I might have done a little bit better job.

Q. In any event, this represents a statement by you in a few words of the nature and subject of each of the patents that I have referred to, is that correct?—A. That is right.

Mr. WEBSTER. If your Honor please, I am not going to ask Mr. Barton to describe each of these patents, but I am going to ask him to testify with reference to certain groups of patents, and for that purpose I would
2711 like to offer this in evidence.

The COURT. Is there objection?

Mr. DIXON. Yes, your Honor. I object to the exhibit as an exhibit; I think the patents as such would be the best evidence if the purpose is to indicate what the patents are. Apart from that, the exhibit, from what cursory examination we have been able to make of it, seems to

deal with the opinions of the author of this exhibit with reference to what the patent, numbered, relates to. We feel that the best evidence would certainly be, if relevant, the opinion of the author of the document himself with reference to any one of these particular patents.

The COURT. Supposing this witness proceeded to read the document, would that help you any? You can cross-examine about this. In effect, this is no more than a statement of evidence that he has prepared in advance so as to abbreviate the time it would take to read it to the Court. If you want to take objections to it, we will let Mr. Barton read this document, but I should not see that much would be gained that way.

Mr. DIXON. Of course, your Honor, it is not our intention to lengthen the trial, but if relevant,—I mean it seems to us the purpose of the exhibit, if it could be more clearly explained, or if we could have a little more light on what it is being offered for—

2712 The COURT. I can guess he want to show how valuable the patent situation was as it developed in the twenties, and he is laying the ground for all that by introduction of the Barton patents. We have heard a great deal about the Barton and Rossi patents, and the Jebson-Barton-Rossi patents, and this is one of the trio who is here in the flesh, so I suppose that is his object.

Mr. WEBSTER. That is correct. I simply stood here accepting that as an attempt to abbreviate a presentation of quite a lot of material, and I thought it would facilitate the matter.

The COURT. The alternative is to have him offer all these patents in evidence, and then Mr. Barton would still be allowed to make comments about that. He has qualified as an expert, and anyway he is an inventor. I think I will let the exhibit in.

(Defendant NL Exhibit 2 for identification received in evidence.)

Q. Now, Dr. Barton, have you at my suggestion made a study of those patents referred to in this Exhibit NL-2 with a view to grouping certain of the patents with reference to their subject matter and use?—A. Yes.

Q. Now I first ask you to look at your abstract briefly of patents 1,106,406, 1,106,407, and 1,106,408. Will you just glance at the abstract a moment to refresh
2713 your recollection of those patents.

The COURT. The first page in this exhibit is numbered 5. I suppose there is some reason. I am not miss-

ing four pages?

Mr. WEBSTER. No. I think that is because it was attached at some time to other papers. Does your Honor's copy begin with 1,106,406?

The COURT. That is correct.

Q. Have you had an opportunity to look at those, Mr. Barton?—A. These three patents in each case depend upon the smelting of the titaniferous ore with an alkali and reducing agent, for example coke, with the object of converting the iron to the metallic state. Now after having reduced the iron the melt could be taken as such, treated with water, and a great deal of the soda salt could be removed and then finally treated with very dilute acid to dissolve out iron and iron compounds, leaving a product relatively rich in titanitic acid and carrying perhaps a small amount of soda.

Q. Did this group of patents represent an advance in the art at that time?—A. Well, yes, I believe so. The method appealed to us because if we could successfully carry it out, as for example according to this patent 1,106,407, the second one on this page, if we could smelt the ore and tap out the metallic iron and have that as a by-product, 2714 it would be a high-grade iron under the conditions,

because any impurities, such as phosphorus or sulfur would go with the alkali, and that would perhaps cheapen the process if we could do that, and then we would have the residue, after withdrawing the iron, we would have that, and we could further treat that, as I have just described, and obtain a concentrate of titanium oxide.

Q. Did that process have any disadvantages?—A. Yes, it had disadvantages. Of course it should be borne in mind that one of our objects was to produce a relatively pure titanium oxide and one, say, that contained 90 per cent or above of titanium oxide, and that would be useful for the purposes of the Alloy Company. Now they had right in their plant at the time equipment that was suitable for carrying out the processes as described in these three patents.

Q. What sort of equipment was that?—A. Well, those were electric furnaces.

Q. Was the electric furnace method an advantage or disadvantage from the standpoint of titanium pigments?—A. Well, that would make no difference if it was not too expensive, but of course the operation of an electric furnace is expensive, and while we might make a product that was cheap enough for their purposes,

we might not be able to produce a titanium concentrate to be further worked up for making pigment on a large scale and do it economically.

Q. At that time at Niagara Falls was power cheap or expensive?—A. Power was cheap. Yes, it was cheap. My recollection is it was somewhere in the neighborhood of \$20 per horsepower a year, but I would not put that down as—

Q. You would not swear to that?—A. No; that is just my dim recollection after a good many years.

Q. How about the furnaces? Were furnaces of that sort available and satisfactory?—A. Well, they would be available, but they would not be, as I said, satisfactory on a large scale operation. Now if we were going to a very large scale manufacture according to these patents, we would probably have to resort to something like a blast furnace, or some other type of furnace where the heat is generated by the combustion of gases or fuel and passes over or through the charge. Now the difficulty there is that sodium compounds react with most any lining that is available for such a furnace, and linings would probably not last very long, so that it was not really a very good prospect for very large scale manufacture of titanium pigments.

Q. I am going to ask you about another group, Mr. Barton. Will you look at your abstract to refresh your recollection of patents 1,155,462, 1,166,547, 1,892,229 and 1,236,655, and after you have had an opportunity to examine the abstracts, tell me what the characteristics of that group are, if you can.—A. The common point in all of those patents is that the titanium must be precipitated or separated by hydrolysis in the hydrochloric acid solution, and the difficulty with all of those processes is that on a large scale it was at that time, and probably still is, rather difficult to find materials of construction that would withstand the hydrochloric acid. There are important patents in that group. For example, this one, 1,155,462 relates to the addition to a titanate sulfate solution of a soluble chloride, for example, calcium chloride, and that precipitates a calcium sulfate and it gives free hydrochloric acid in the solution. Then the titanium is separated by hydrolysis, as shown, in the presence of this calcium sulfate. That is the first composite pigment that was developed and which we referred to as giving such poor results on exterior exposure.

Q. You say that was a disclosure of the composite type of pigment?—A. Yes.

Q. You might look at No. 1,236,655 in that connection, too.—A. Yes.

Q. Those patents relate, I believe you say, to the disclosure of a composite type of pigment?—A. Yes. That one relates to the composite type of pigment.

Q. Do you know of any previous disclosure of inventions of a composite type?—A. No. I think that was the first proposition for a composite type pigment.

The COURT. In the titanium field?

The WITNESS. In the titanium field, yes.

Q. Directing your attention to 1,155,462—I believe these are the same ones—will you describe very briefly what that process is if you have not already done so.—A. Well, the method consists essentially in treating titanate solution by adding a soluble salt such as calcium chloride capable of forming, by reaction, an insoluble sulfate and then digesting—I have said digesting or heating. I used the word “hydrolyzing” in mentioning this a few minutes ago, but it amounts to the same thing. This digesting or heating brought about the hydrolysis of the titanate acid, and then that composite precipitate is separated, washed and dried and calcined.

Q. Did the preparation of pigments according to this process require any special form of equipment?—A. Well, it would require something that was resistant to the action of hydrochloric acid.

Q. Did you succeed in finding material?—A. We did in the pilot plant. We used stoneware, but that would not be possible in a commercial way. We would probably have to develop some type of wooden equipment that perhaps would last for some time. I believe that rubber linings were not available then.

Q. So that this group of patents was not put to commercial use, is that correct?—A. In view of the fact that we developed better processes later these were never used. There have been many proposals to use hydrochloric acid, and as far as I know no one has succeeded in commercially producing titanium pigments using hydrochloric acid solutions.

Q. Did this, however, represent steps in your research and patent work?—A. Yes.

Q. And would it be your opinion that these patents had a use and value in connection with the development of the

art?—A. Yes. If at that time we could not have found better methods we would have found some methods, some kind of equipment, whereby we could produce titanium pigment by these processes.

Q. Do you know and can you say whether or not work in this particular field is still going on at some places?—A. Yes. I believe there is a great deal of work that has been carried on in the use of hydrochloric acid solutions for producing titanium pigments, and perhaps are still going on. I am not absolutely sure of that.

Q. Not under your control?—A. Not under my control.

Q. And in fact never was under your control—this work you are now referring to?—A. No.

2719 Q. Now I am going to ask you to look at another group: Nos. 1,106,409 and '10; 1,171,542; 1,201,541; 1,206,796; 1,206,797 and '798, and 1,348,843, and after you have looked at those please tell us what the objective of that group was.—A. This group of patents depends upon the conversion of the iron into the form of sulfide, also the formation of sodium sulfide or other alkali sulfide which permits a pretty sharp separation of the titanium compounds from the iron compounds.

To illustrate it, we take this No. 1,106,410, which consists in the process of fusing titaniferous ore with alkali sulfate and a reducing agent, such as coke. The iron is converted into a more readily soluble form such as ferrosodium sulfide, and the resulting melt is first treated with water to remove sodium and iron compounds, and then the remaining residue is treated with acid to dissolve as far as possible the remaining impurities. Some iron would still remain leaving a residue of titanate acid which is calcined to yield titanate oxide. That gives the principles of the entire group.

Q. Now, the last of the patents in there, 1,348,843, does that relate to oxidation?—A. Yes. This melt after cooling could be sprayed with water just to moisten it and exposed to the atmosphere to oxidize the sulfides to sulfates and sulfites, a rather complex mixture of salts,

2720 and we could then treat that mass with acids, either hydrochloric or sulfuric acid, without the generation of hydrogen sulfide. At that time one of the difficulties in all of these sulfide processes was that if acid came in contact with the sulfides a poisonous gas, hydrogen sulfide, would be generated and we had to guard against that in every way possible.

Q. This oxidation step, did that grow out of the work

that was being done in this group of patents?—A. Yes, because we recognized the danger of handling of products that would generate hydrogen sulfide gas if treated with acid. We wanted to get it into a form that would not generate the hydrogen sulfide, and this patent you speak of, by oxidizing in the presence of moisture, would bring about that conversion.

Q. Did these processes yield a good product?—A. Yes, they do. It gives a very sharp separation of titanium and iron compounds. We can take a titaniferous ore, such as ilmenite, and separate it and get a concentrate of titanium oxide which will contain perhaps not over 2 or 3 per cent of iron oxide without ever having brought the titanium into solution. We have rendered the iron soluble and removed it either by water or by treatment with dilute acid. The dilute acid of course we always had available, because whenever we hydrolyzed a solution to obtain titanic oxide or a composite pigment we would have all this dilute acid which could be used in treating the impure product to get the concentrate of titanic oxide.

2721 Q. You say you had the dilute acid available.

Was the raw material available in other respects a feature of this development work? I had in mind the nitre cake.—A. Yes. One of the forms of sodium sulfate that could be used was the bisulfate which is known as nitre cake, and at that time that was a very cheap material. We could get it for four or five dollars per ton, and as a matter of fact during the first World War we obtained some merely for the cost of transportation. They were producing so much of it for war work that they were glad to get it off their hands, and so we simply paid the transportation cost. But that did not last very long.

Q. What happened about the price of nitre cake later?

—A. After the war the price of nitre cake increased quite rapidly, and I believe it has gone as high as \$20 a ton. The present price I think today is \$16 a ton.

Q. Is such quantity of that used as to make the expense of nitre cake an obstacle in the use of this process?—A. Yes.

Q. I believe you mentioned the problem that arose
2722 in connection with the poison gases? How about the matter of equipment? Was it possible to manufacture this under this group of patents on a large scale with the equipment available?—A. Well, by using the process of this Patent 1,348,843, we could treat the material with the

generation of very, very little, and perhaps no, hydrogen sulphide whatever, and the very little we could get rid of, as we did at Niagara Falls, by sending it up the stack. We had a 200-foot stack that carried it pretty well above the danger point for anybody, and then it was so dilute that it probably would not have caused any serious damage anyway.

Q. May I ask you to look at your abstract for Patent 1,206,796 particularly. Did that represent a means of an attempt to avoid some of these manufacturing difficulties?

—A. Yes, that was developed to solve the furnace problem in making a sulphide melt. I have already explained, I think, that these alkaline compounds had a very corrosive effect on most furnace linings, but we could make a product in large electric furnaces lined with carbon and there was no difficulty there, but in making the melt in other types of furnaces we ran into difficulty. We did construct in the pilot plant a reverberatory furnace, oil-fired, and with a lining and bottom consisting of carbon blocks up to the contemplated level of the charge of molten material, 2723 and above that was fire brick. Well, we could make just as good a product from that furnace as we could from the electric furnaces, but we found that the furnace gases carried along a certain amount of volatile compounds, and perhaps some that was in solid form, fine mist, and corroded the fire brick in the flues very rapidly so that was practically a failure as far as commercial purposes are concerned.

Q. Was this other process that you mentioned a moment ago that avoided that called sintering?—A. Yes. Which patent is that?

Q. I think that is No. 1,206,796?—A. Yes. Instead of melting the charge we heated it below the melting point. A charge was made up of ore and alkaline material, perhaps nitre cake and coke, or in this case I think we used preferably soft coal, and that was heated to a temperature below the melting point of the mass with the result that we could handle it in large iron containers or in a brick lined container or equipment.

Q. With reference to this whole group of patents, this group 3, were those used industrially?—A. Yes. We operated the plant at Niagara Falls for several years using the process.

Q. During what period?—A. We first operated in the very latter part of 1919 or 1920. Those were trial 2723a runs of the new plant which had never been operated to amount to anything, and then from 1920 to

1924 I think, or 1925, we used this sulfide process commercially.

(Short recess.)

2724 Q. Now, Mr. Barton, were the products that you obtained from the use of these five patents comparable to the products you were able to obtain from some of the earlier patents that you have just described?—A. Well, in this group I have merely described the methods I believe of producing this relatively pure titanium oxide for commercial purposes, such as its use in the alloy and so forth.

Q. I want to turn to another group, the last group, and direct your attention to 1,196,030, 1,196,031, 1,205,144, 1,223,357, 1,223,358, 1,234,260, 1,235,638, 1,240,405 and, finally, 1,409,648. If you will, just look at those and then if you can tell us what the characteristics are, if any, of that group?—A. These patents, the patents of this group, all refer particularly to the preparation of titanium products relatively pure or pigment quality products from sulfate solutions, avoiding the use of the chloride solutions before referred to which were difficult to handle on account of the corrosive nature of the acid on equipment.

Take this first one, 1,196,030, it covers a process of preparing a titanium basic sulfate. I called it titanium basic sulfate; sometimes called basic titanium sulfate; I think titanium basic sulfate was Dr. Rossi's preference. A titaniferous material such as ilmenite or a titanite oxide concentrate obtainable, for instance, according to the

2725 methods of patents 1,106,409 and 1,106,410—that refers to these sulfide methods that I have just described in the last group—is heated with concentrated sulfuric acid. After reaction, that is, after the solution of the material in the acid, the resulting digestion mass is dissolved in water and separated from any undissolved residue. Ferric iron in solution is reduced to the ferrous state, the reduction conveniently accomplished in an electrolytic cell, continued until a little of the titanium is in the titanous condition. The solution is then boiled to precipitate the titanium basic sulfate.

That is simply a description of the method that is used today in principle—to separate titanium from sulfuric acid solutions hydrolytically. The fact that we reduced the solution to obtain some titanous titanium in the solution in an electrolytic cell makes no difference. The principle is the same as used today.

Q. Now take patent No. 1,409,648, which is the last patent in this group, and just tell us in your own words,

Mr. Barton, what that patent is all about.—A. I have gone into a little more detail with regard to some of the other patents in this group. I have just described how we would operate to make titanium basic sulfate and if that product was obtained, we would have titanium oxide of pigment quality.

Now, we also could make the composite pigments from titanate sulphate solutions prepared as described for making basic titanium sulphate. We could add to the titanate sulphate solution a reagent, such as calcium hydrate, which by reaction would form calcium sulphate or we could first separately prepare calcium sulphate or barium sulphate and add it to the titanium sulphate solution. The solution containing a suspension of calcium or barium sulphate, was then heated hydrolytically precipitate the titanium.

We found by experience that we could obtain a better product if we first prepared our extender, either calcium sulfate or barium sulfate:

This patent you speak of, we first prepared this so-called blanc fixe. We prepared that product, barium sulfate, in a very finely divided condition. The product can be purchased in the market, and we did that at first in a commercial way. We bought the blanc fixe and added it to the titanium sulfate solution. But we had a great deal of difficulty in obtaining blanc fixe of uniform quality, and we finally installed our own plant for the manufacture of blanc fixe.

Q. Is this patent, No. 1,409,648, still in use?—A. That is still in use.

Q. Does that relate to the manufacture of Titanox-B?—A. Titanox-B.

Q. Did these patents in this group prove to be of relatively great importance or little importance?—A. Well, some were of great importance. For instance, this one, which we still manufacture. But we did find that the product that is described in one of those patents, the calcium sulfate product, was not as good as could be made. We modified the process finally to obtain calcium sulfate that had a different structure, had what we called an acicular, crystal, structure instead of the rhombic.

Q. Now, why was it that the processes described in this group were not particularly satisfactory commercially? Was there any reason for that?—A. I have not stated that. This one here is representative of the group.

Q. I understand that one is used to make the Titanix-B, but are the processes described in these patents otherwise

used today?—A. No, they are not used today. Improvements have been made in the manufacture of pure titanium oxide and the composite calcium sulfate pigment.

Q. Was this a costly method of making it, compared with methods described—A. Relatively costly, for the reason that we started with those products made by the sulfide process which we described in the last group.

Q. Were products manufactured under this group
2728 sold commercially to paint manufacturers?—A. Yes.

We developed the titanium industry with this product that is made by this process of 1,409,648.

Q. Did the process described in 1,409,648 supersede the process described in 1,205,144?—A. Yes. That happened to 1,205,144. That refers to the use of a base. For example, if we wanted to make the Titanox-B pigment we would use, say, barium hydrate, added to the sulfate solution and form the barium sulfate.

Q. You say these were sold commercially to paint manufacturers. Do you know if they were sold at a profit to paint manufacturers?—A. As products—

Q. At a profit. Were they sold at a profit?—A. No.

Q. When did you build your first pigment plant, Mr. Barton?—A. The plant was built in 1916.

Q. When was that first occupied and used?—A. Well, we could not use it while the war was on, and after that there was some little time elapsed before we even tried it experimentally. But I think in 1919 we did make some trial, but I couldn't say positively about that. In early 1920 we did make Titanox-B pigment, using the process of patent 1,409,648.

Q. That is in the new plant?—A. In the new plant.

Q. That plant was designed to be an industrial plant, wasn't it?—A. Yes. As a matter of fact it was designed to make C pigment, but on account of the
2729 better behavior of the Titanox-B as an exterior pigment in paint, we changed the plant sufficiently to make Titanox-B pigment.

Q. Before 1920 did you engage yourself in any publicity efforts to promote titanium pigments?—A. Yes. We took a great deal of pains to bring the titanium pigment to the attention of the public. We had an exhibit at the annual chemical show that was held either in Chicago or New York City and took pains to explain the prospects to all those who visited the booth. That was one of the things that we did, make a good many contacts to develop a little interest.

Q. Did you do any work during this period with the rubber companies?—A. Yes.

Q. Will you tell us what that was?—A. During the war we prepared enough of the titanium pigment to make tires at the rubber plants. I visited both Firestone and Good-year in Akron and they cooperated in making rubber containing the titanium pigment as a filler. It was a beautiful white rubber—and we had more recently white side-walls on tires, pigmented with titanium oxide. But at that time there was no prospect of getting the plant started. We hoped that perhaps it would do something to rubber that would enable us to get permission from the Government to go ahead and operate the plant. That did not prove to be the case, though, because people did not have to have tires with white walls and the rubber was of no greater strength than with some other fillers.

Q. Were you personally engaged in these efforts to promote titanium pigments?—A. Yes.

Q. Did you make any efforts or any investigations among paint manufacturers?—A. Yes. We visited some paint concerns, for instance, the Acme White Lead & Color Works, in Detroit, and they cooperated with us in making a lot of paint products and exposed them on their test fences. And others were—I can't remember all of the companies that we called upon and got their cooperation in that way.

Q. Do you know Mr. Hagar?—A. Mr. Hagar was the sales manager in the early days when we were trying to introduce the pigment commercially.

Q. He was the sales department practically, wasn't he?—A. Yes. I worked with Mr. Hagar, went with him to visit some customers and some customers I called upon at his request just to discuss with them the use of the pigment in paint.

Q. Now, did it appear to you that there was any need for developing cheaper methods of manufacturing titanium pigments?—A. Yes. We realized that we must reduce the cost in some way. Our composite pigment

2734 Titanox-B cost in the neighborhood of 13 to 15 cents a pound to make and we sold it for less during the period between 1920 and 1925.

Q. Well now, have you yourself done any work in the sulfuric acid attack method of manufacturing pigments?—A. Yes.

Q. Will you describe that?—A. We had done considerable work on that prior to this operation by the sulfide

process. I think that it might be well to mention the fact, I did say earlier, that it was known to attack titaniferous iron ores with sulfuric acid. And in 1912, just after we had got started, a patent was issued to a man by the name of Weintraub and was assigned to the General Electric Company, and it describes the process of dissolving the iron ore, titanium iron ore, ilmenite particularly it mentions, in sulfuric acid, the reduction of the iron to the ferrous state, and the separation of the titanium by hydrolysis from the solution. We of course tried to find methods that would give us a relatively pure titanium oxide without danger of infringing that patent at the time. And these sulfide methods were distinctly different.

Q. Did you work in the field described or indicated by Weintraub in an effort to find a better or non-infringing method of— A. Well, we worked with sulfuric acid 2731a solutions of ilmenite in an experimental way, but not looking forward at the time to using the method commercially. We began to see the other patents that were being taken out relative to the direct sulfuric acid attack of ilmenite.

2732 Q. What patents do you refer to?—A. I refer to the Titan Company patents.

Q. You mean the Jebesen patents?—A. Well, we learned about the important Jebesen patent a little later. But there were some that came out I believe earlier than that, but the Jebesen patent, the one that I refer to—I think there were several Jebesen patents, but this one I am referring to suggests the solution of the iron and the titanium with a lesser amount of sulfuric acid than we had believed possible. Even Weintraub recommended about twice the weight of the ore. But the Jebesen patent showed that the proportion of sulfuric acid to titanium might be about half what we had calculated or what Weintraub had calculated.

Now, that was an entirely different process and the Titan Company were able to obtain a patent. We were rather anxious to have the rights to operate under that patent because we recognized it as a cheaper method than the methods we had developed.

Q. Was it just a cheaper method or was it a substantially cheaper method?—A. Well, it was substantially cheaper; also, it was simpler.

Q. Had you prior to this been able yourself to approach the result obtained under Jebesen's by the application of sulfuric acid?—A. Will you please repeat that?

Q. I just wondered if you yourself in any of your ex-

2733 perimental work had approached the results described by Jebesen in his patent.—A. We didn't do very much work with the basic solutions, such as described by the Jebesen patent, until we had later made an arrangement with the Titan Company.

Q. Was it your opinion that for you to use the process described by Jebesen would be an infringement on Jebesen?

—A. If we used it?

Q. Yes.—A. Yes.

Q. Well, now, did you know of the arrangements that were made in reference to the Jebesen patent between the Titanium Alloy Company or the Titanium Pigment Company and Dr. Jebesen's company in 1920?—A. Yes.

Q. What effect did that have on your research and manufacturing operations?—A. Well, as soon as there had been an arrangement made, we immediately started to investigate the methods of the Titan Company, particularly the use of the basic solutions. We knew that we had in the composite pigments an article that would find a market. By that time we had established that. Now, if we could find some cheaper method of making it, instead of costing 13 to 15 cents a pound, if we could get the cost down maybe to even 7 to 8 cents a pound, we would probably be able to make some sales. So, we started to investigate the Titan Company methods as soon as arrangements had been made.

2734 And during the year 1920, the latter part of the year, and 1921, we concentrated on that work in a research way. Of course you understand that we had to adapt those processes to the preparation of the product that we had already developed and which we knew would be successful as pigment products. The composite pigments particularly we were interested in.

Q. Why was that?—A. Well, we had entirely different ores, for one thing, and we found that in our basic solutions we could not use quite as little acid as shown by Jebesen's patent, but still we could make some saving; and even if we did not make any saving in acid the simplicity of the process would enable us to produce our composite pigments at a lower price.

Q. Did any of the Jebesen patents, that is the Titan Company patents, refer to composite pigments at all?—A. There might have been one in a way referred to, but not in a material way.

Q. Was it possible under the Jebesen process to make a high quality TiO_2 pigment, or did you do further work on that?—A. Well, we really didn't determine at that time

Just what could be done with TiO_2 . The fact is that what we were trying to do then was develop the composite type of pigment. We believed that that pigment because of its relatively greater hiding power and tinting strength would be preferable to the pure titanium oxide. We operated the plant with the old sulfide process up until about 1925, notwithstanding the fact that we knew we could successfully operate by the methods of the Titan Company; we did that because we wanted to continue to supply customers with pigment notwithstanding the fact that we were manufacturing at a loss. And we preferred to do that rather than change the plant at that time at Niagara Falls, because it seemed better to build a new plant, which we did, at St. Louis, and the plant at St. Louis was designed to operate by the solution process. As soon as that plant was in operation and could take care of the business that we had developed, then we converted the Niagara Falls plant to operate by the solution process.

Q. That involved, I take it, putting the Jebsen patents into practice?—A. Yes.

Q. On a commercial basis?—A. Yes.

Q. Now I want to ask you about another patent or group of patents. Did the Blumenfeld patent come to your attention?—A. Well, that was a little later.

Q. When did that occur?—A. I can't tell just exactly the date that I was first acquainted with the Blumenfeld patents. But I might explain that we had been interested in making composite pigments, and a little later Commercial Pigments Corporation, I believe it was, first made titanium oxide using the Blumenfeld patents, if I am not mistaken; I think that is correct. And then we bent our efforts to the development of the titanium oxide that would be of good pigment quality, and we made one which was quite an excellent product, and would compare, we thought, favorably to the product that was being made by the Commercial Pigments Corporation. But that process was relatively expensive as compared with the process that we gathered was being used by the Commercial Pigments Corporation.

2736. Q. Did you examine the Commercial Pigments Company product to determine its purity?—A. We did have products, yes.

Q. And did you find that it was relatively high in purity?

—A. No, they were rather free from impurities.

Q. No. I say that it had a high degree of purity.—A. Yes.

Q. And so therefore a high quality?—A. High quality, yes.

Q. And did you then look into the claims of the Blumenfeld patents at all?—A. Every patent that was issued on titanium and particularly titanium pigments, got some attention and I was intrigued with the value of some of the Blumenfeld patents.

Q. If you can put your finger on the outstanding teaching of Blumenfeld would you describe to us what Blumenfeld did that you thought was of particular value?—A. Well, I cannot give you the patent number.

Q. I am not asking for that.—A. But he took out a patent which related to the hydrolytic separation of titanium from a concentrated titanium solution, and he did it after he had obtained the right concentration of solution. Blumenfeld first prepared a titanic sulfate solution of proper concentration and added it to hot water during a regulated period of time. That was supposed to separate a colloidal form of titanium first, and as a result he
2737 got thereafter, by continued heating, a good yield of titanium oxide in the relatively concentrated solution.

Q. And was that a better yield than you were able to get?—A. Our experiments with that process of that patent indicated that it was about the best that we knew of at that time.

Q. Now during this period that you were selling at less than cost, did you go into the matter of forming an association with other companies? Did you consider joining forces with any other companies in order to strengthen your financial situation?—A. Prior to our arrangement with the Titan Company, several large companies were approached with the idea of getting financial assistance to carry on. There was Pittsburgh Plate Glass Company, New Jersey Zinc Company, the du Pont Company—

Q. And the National Lead Company?—A. And the National Lead Company.

Q. And did those companies send their representatives up to examine the work that you were doing there?—A. Yes. Each of those companies sent representatives to Niagara Falls to look over the plant which had been built, and looked over the processes, and we had general discussion on the merits and so forth.

Q. And the one that decided to go ahead on this was the National Lead Company, I take it?—A. Yes.

2738 Q. Was that at or about the time that the arrangements with Dr. Jebesen were made?—A. Yes. It practically coincided. Of course I was not an official of the company and those things were handled by the officials, so I did not know all about the details of those arrangements. I believe—this is just—I better not put this on the record.

Q. You were not concerned with the management of the company?—A. That is right.

Q. And what you knew you knew from the effect on the operations in the plant?—A. Yes. I consulted, of course, with our own officials and also during these negotiations I consulted with various officials of the National Lead Company.

Q. What was the purpose of that consultation?—A. Well, to let them know just exactly what we had and put the cards on the table.

Q. Did you tell them about the Jebesen patents?—A. Yes, I told them what I thought about them, and their advantages, and so forth.

Q. And I assume you told them what you told us this afternoon, that it represented a cheaper and a simpler method of getting a good result, is that correct?—A. That is right, and which to them meant to them if they would just join forces with us, there would be competition.

2739 Q. Now directing your attention to another subject for a moment, what was the situation with reference to the sale of pigments when you first started attempting to sell them, titanium pigments? What other pigments were important at that time?—A. Well, we had white lead, lithopones, zinc oxide, and some so-called basic sulfates and sublimed white leads, and so forth.

Q. I believe you told us that the first industrial product by the solution method was in 1922, is that correct?—A. By the solution process?

Q. Yes.—A. I believe, yes, in 1922, we made an experimental run, using the solution process.

Q. But it was not until the St. Louis plant was completed that you—A. That we operated regularly.

MR. WEBSTER. That is all.

THE COURT. We will suspend at this time until tomorrow morning.

(Adjourned until Wednesday, January 24, 1945, at 10:30 a.m.)

2740

UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, January 24, 1945, 10.30 o'clock a.m.

Trial resumed.

LOUIS EDWARD BARTON, resumed the stand.

Mr. WEBSTER. If I may, your Honor, I would like to make two or three corrections.

The COURT. All right.

Direct examination continued by Mr. WEBSTER:

Q. Mr. Barton, on page 2737 I am reported as asking you this question:

"Q. Now, during this period that you were operating at less than cost, did you go into the matter of forming an association with other companies?"

Now, I should have said and you understood me to say, or thought I should have said, "selling at less than cost"; is that correct?—A. Well, I thought that you meant that while we were operating in such a way that we sold for less than cost.

Q. That is correct. Now, toward the end of your testimony in connection with your statement that the representatives of other companies, namely, Pittsburgh Plate Glass Company and the du Pont Company and then
2741 the National Lead Company, had been in touch with you and after you had testified that the arrangement between the Titan Company A/S and the Titanium Pigment Company took place in 1920, at a time coinciding with your further development work, I asked you certain questions about your conversations with the National Lead Company concerning the Jebesen patents, and at the foot of page 2738 I asked you this question:

"Q. And I assume you told them what you told us this afternoon, that it represented a cheaper and a simpler method of getting a good result, is that correct?" To which you are reported as giving this answer: "A. That is right, and which to them meant to them if they would just join forces with us, there would be competition."

Now, would you like to correct that answer?—A. Well, I don't—

Mr. Dixon. May I please the Court, I think that was the witness's answer.

The COURT. The witness may be called upon to explain or modify.

Mr. DIXON. All right. I just thought he was correcting it.

The COURT. We just don't strike out the text. This is supplementing the examination.

A. There is something wrong with that. I don't think that I said that at all. But I do remember referring to competition. Now, that term probably should not have been used, because what I meant was that if they didn't join forces with the Titan Company there would be danger of conflict. What I had in mind particularly was the matter of conflict with patents.

2742 Q. Now, you at that time had a process under which you could make composite pigments, did you not?—A. Yes.

Q. And Dr. Jebesen had a process by which pigments could be made more simply and more economically, is that correct? A. Correct, yes.

Q. And then what was the advantage to you of being able to use the Jebesen patents?—A. These composite pigments could be made either from the solutions which were prepared from those, what we might call them, crude titanic oxide. I described them yesterday as substantially pure or relatively pure. Now we could use that material or we could use ore. We could dissolve ore in acid or we could make these composite pigments. Of course we were not free to use the direct attack of sulfuric acid on the ore so we would be obliged to resort to our own processes under which we first prepared a substantially pure, that is a crude, titanic oxide largely separated from the iron.

Q. In a nutshell the advantage to you was getting access to Dr. Jebesen's direct attack?—A. The direct attack on the ore with sulfuric acid.

Q. I failed yesterday to refer in my examination to the Titanium Pigment Company. When was that company organized and what was its relation to the Titanium Alloy Manufacturing Company?—A. I believe that the Titanium

Pigment Company was organized somewhere just 2743 prior to 1916, but I cannot tell positively. I would have to dig into some records somewhere to tell you just exactly when that happened. It might have been a little earlier; it might have been as early as 1914. I cannot say positively.

Q. And were you employed in the interests of both companies?—A. Yes.

Q. And the titanium pigment patents that you discussed yesterday, were those assigned to the Titanium Pigment

Company?—A. I assume that they were. Of course that was a formality that took place with the officials of the company.

Q. And the arrangement that was made with Dr. Jensen's company, that, according to your understanding, was an arrangement with the Titanium Pigment Company?—A. Yes.

Mr. WEBSTER. That is all.

The COURT: Just to note a small correction in the schedule of corrections on page 2639, the first line, you corrected "has three sways" to have it "have it three ways." I think the word should be "free-sway."

Mr. WEBSTER. I think we can accept that, your Honor.

Mr. DIXON. May it please the Court, I have a couple other suggested corrections to make on the record for the previous day; at page 2630 it has been directed to my attention that the word "not" was left out in your 2744 Honor's statement with reference to the purpose for which the exhibits were being offered by the Government. I believe that should read "the Government is entitled to show that some of these arrangements have not been abandoned or may be only suspended."

And in yesterday's transcript, page 2711, I find when I rose to make an objection that if I did not say it what I intended to say was "We feel that the best evidence would certainly be the patent" and then "if relevant, the opinion of the author of the document himself with reference to any one of these particular patents, would be incompetent."

The COURT. The reporter evidently thought you said that. I see a pencil notation of it in my copy but erased.

Mr. WHITNEY. I have a few very short ones, but I think them important enough to trouble about.

On page 2668, fourth line from the bottom, "one European country" should be "one European company."

On page 2670, second line, "constantly" should be "consistently."

And on the same page, second full paragraph, third line from the end "1940" should be "1941."

At the bottom of page 2671, second line from the bottom, "Williams" should be "Williamson."

2745 Page 2688, and this is the most important, the middle of the page, the full paragraph, line 9, there should not be a "not"; "assuming, arguendo, that they are in a position of illegality."

Page 2691, the end of the paragraph that is continued

over from the top of the page, that is to say lines 9 and 10 of the page, the quotation mark should go to the end of the paragraph instead of after the word "fault". And the fourth line from the bottom of the same page, much as we all revere the memory of Mr. Justice Holmes—

The COURT. All right. We will put "The Common Law" in caps.

In what order do you want to proceed with cross examination. Do you want to proceed now, Mr. Whitney?

Mr. WHITNEY. Mr. Dixon and I have discussed it a little bit, pleasantly, but I think without agreement. My view was that as Mr. Dixon has a controversy with Mr. Webster that he should go first, and that if I then thought there was something that I should ask it would seem your Honor would afford Mr. Dixon the opportunity of cross examining on my issue. In other words, I am by no means supplementing Mr. Webster with respect to these witnesses. I am either indifferent or in conflict.

The COURT. I would say normally we would require the co-defendant to cross examine before the Govern-
2746 ment, but I think there may be some special circumstance here which warrants a departure from the general rule. I have no objection to asking Mr. Dixon to proceed now and if you develop anything new Mr. Dixon will get another crack at it.

Mr. WHITNEY. Your Honor has been liberal about giving people a second crack anyway. At least you have been liberal to me, and I suppose in a three-cornered case it arises—

The COURT. Bound to be. I think the thing to do is not to get unduly exercised about these rules.

Mr. WHITNEY. Of course I deferred the issue with Mr. Dixon because I thought perhaps your Honor would come in this morning sustaining the motion to dismiss but that has not arrived as yet.

The COURT. That decision reserved is intended to remain until the end of the case.

Mr. WHITNEY. I fear when I put in any evidence that the decision will have to carry over to the ultimate motion, will it not?

The COURT. Well, there is still something left in the cases about the motion at the end of the plaintiff's case.

Mr. WHITNEY. We have so little of the pleasant procedure left let us hang on to that.

2747 Mr. DIXON. Your Honor, at this time then, if that is to be the order of procedure on cross examination

of witnesses, we will waive an examination of this witness, reserving to ourselves the right you have already suggested.

The COURT. But you understand now that if you do that you will be limited in your cross examination to such matter as Mr. Whitney develops on further examination. In other words, I take it you have no cross examination of the direct testimony developed by Mr. Webster?

Mr. DIXON. That is right.

The COURT. Very well.

Mr. WHITNEY. Well, will your Honor allow me to be deemed to have completed my cross examination?

The COURT. All right. You are excused.

(Witness excused.)

2748 CHARLES F. KAEGBEHN, called as a witness on behalf of the defendant National Lead Company, having been previously duly sworn, testified as follows:

Direct examination by Mr. WEBSTER:

Q. Mr. Kaegbehn, you have already testified that you are the head of the Patent Department of the National Lead Company. Will you tell us what that department consists of?—A. May I ask if you are inquiring into the number of people in the department?

Q. The number of people in the department.—A. When we are fully staffed, which we are not at this time, it consists of myself and an assistant and three young ladies.

Q. When did you become the head of the Patent Department of the Lead Company?—A. About March 1st, 1937.

Q. Did the Lead Company have a patent department prior to that?—A. No, sir, it did not.

Q. Do you know how they handled their patent matters prior to that date?—A. The various divisions and subsidiaries would handle their own patent affairs. Patent application on such inventions as arose from the general National Lead laboratories were prepared and filed and prosecuted by outside attorneys. The titanium cases were handled through different attorneys. But before 1937 and after 1934 I constituted a patent department for the

2749 Titanium Pigment Company and the Titanium Division.

Q. What time was that, 1934?—A. That is right.

Q. The patent department that you have described is the patent department for the Lead Company as a whole, is that correct?—A. That is correct.

Q. That includes a number of divisions other than the Titanium Division?—A. That is right.

Q. Would you mind just naming the other principal divisions of the Lead Company?—A. The principal divisions of the Lead Company which are active patent-wise would include our so-called Magnus Division and our Baroid Division.

Q. Have you had occasion to become familiar with patent departments of other companies engaged in the manufacture of chemicals?—A. In a general way, yes, sir.

Q. Are you acquainted with the size and personnel of that part of the patent department of the du Pont Company that is concerned with titanium pigments?—A. I have met the gentlemen and have had dealings of mutual interest with them.

Q. Comparing your department in respect of size to the patent department of the du Pont Company, concerned with titanium pigment matters, is your patent department large or small?—A. I think we are somewhat smaller.

Q. As the head of the patent department, what 2750 are your duties and functions?—A. The patent department is supposed to have general supervision over the patent activities of the company. That is, a rather general grant of authority; it includes the examination of inventions made by our technologists, the preparation, filing, prosecution of patent applications, negotiation of license agreements, either to take licenses under patents of other parties or to grant licenses under patents of National Lead Co.; to pass on questions of infringement when such may arise, either whether we are infringing patents of other parties or other parties are infringing our patents.

Q. Do you work with the scientific or technical men in connection with their applications for patents?—A. Yes, sir.

Q. How is that work carried on?—A. Well, in answer to that question I can illustrate our procedure with the Titanium Division. There we have a liaison man who is a technical man himself, and periodically he confers with me on the various patent proposals before they reach the stage of applications. Where necessary, we call in for consultation the inventor himself. Generally speaking, this technical man is able to bring to these meetings as much information of a technical nature as is required.

Q. Is it your practice to make applications for patents

on every invention that is presented by members
2751 of the technical staff?—A. No, sir.

Q. What is your practice and policy?—A. What is presented by the technical staff is called a "proposal for patent." The inventor himself may suggest some phase of his work as having in his opinion novel features, or perhaps one of the supervisory laboratory authorities reading the report will suggest to us something in the nature of a patent proposal. And then it is the function of the department to express an opinion on its inventive-ness. So that we do not apply for everything that comes into our department by any means. We have a great many proposals that never reach the Patent Office.

Q. Have you any standard or guide that you apply in deciding whether or not to ask for a patent?—A. We have general principles rather than firm rules; but of course the most important criteria is its relation to our manufacturing operations. If the proposal is one which is in operation or is shortly to be put in plant operation we bend every energy to prepare and file that application promptly. As it recedes in interest from our commercial operations, the pressure of filing is correspondingly diminished. In determining that we are guided by the advice of the head of our research laboratory and technical director of the Titanium Division.

2752 Q. Do you maintain in your office a file of all the patents of the National Lead Company?—A. Yes, I do.

Q. Do you make it your business to be familiar or to at least have notes which enable you quickly to become familiar with the contents of those patents?—A. Yes, sir.

Q. Is that true in respect of the patents relating to the titanium pigment business?—A. It is particularly true of those.

Q. Now, have you also become acquainted with and do you maintain files relating to the patents that belong or did belong to the Titanium Pigment Company?—A. Yes, sir.

Q. And is the same true with reference to the Titan Company, Inc.?—A. Yes, sir.

Q. I believe you said earlier that you had an official connection with the Titan Company, Inc., is that correct?—A. I am the secretary.

Mr. WEBSTER. May I have these marked in the order in which they appear?

The COURT. Are you a chemist by profession?

The WITNESS. Yes, sir.

Q. Did you practice chemistry?—A. Yes, sir.

Q. For how long a time?—A. Well, after leaving Stevens Institute, in 1928, from 1928 until about 1934, March 1, 1934,

I was engaged in practicing chemistry in two aspects:
2753 one, so-called sales development, technical sales work, and the other in research work.

Q. Did that have reference to titanium pigments?—A. The research work was done for the National Lead Company between the years 1930 and 1934, and the principal object of the work was to determine the compatibility of the white pigments of National Lead Company—that would include titanium pigments—with the then available oil soluble synthetic resins.

Q. What was the objective of that work?—A. Well, as I stated, to determine the compatibility of the white pigments of the National Lead Company with the vehicles containing synthetic resins. Synthetic resins were just at that time becoming of interest as substitutes for natural resins in paint films.

Q. Can't you just put that in language we can understand?

The Court. He wants to know whether you can make white plastics—

The Witness. No, sir. Whether we could—

Q. Put it in language that we can all understand.—
A. Whether we could pigment surface coatings such as paint and enamels with white pigments when those surface coating compositions contain synthetic resins as distinguished from the natural resins.

Q. Have you kept abreast of technical developments
2754 in this country and abroad in respect of titanium pigments since your appointment as manager of the patent department of the Lead Company?—A. I have tried to do so.

(Defendant National Lead Company's Exhibits NL-3, NL-4, NL-5, NL-6 and NL-7 marked for identification.)

Q. I show you a National Lead Exhibit 3 for identification and ask you if you prepared that?—A. I did.

Q. What does that contain?—A. It contains a digest summary of the United States patents to inventors other than L. E. Barton listed in Schedule A of the agreement of 1920.

Q. Are you acquainted with the exhibit that was identified yesterday by Mr. Barton as showing the patents in which he was the inventor or co-inventor?—A. Yes, I am.

The Court. National Lead Exhibit 2.

Mr. WEBSTER. Yes, your Honor.

Q. Is this intended to carry forward that exhibit so as to include patents of inventors other than Mr. Barton?—

A. That is right.

Q. I show you National Lead Exhibit 4 for identification and ask you if that was likewise prepared by you?—A. That was.

Q. What does that contain?—A. This contains a 2755 digest summary of the United States patents of Titan Company A/S, listed in Schedule B of the Agreement of 1920.

Q. I show you National Lead Exhibit 5 for identification and ask you if you prepared that exhibit?—A. Yes, I did.

Q. What does that contain?—A. This contains a digest summary of the United States patents covering inventions made by employees of the Titanium Pigment Company and National Lead Company, made after 1920; in other words, supplementary to those listed in the agreement of 1920.

Q. Now, finally, I show you National Lead Exhibit 6 for identification and ask if that was prepared by you?—A. This was also prepared by me.

Q. What does that show?—A. This is a digest summary of United States patents owned by du Pont or its predecessor Krebs which were used by the National Lead Company.

Q. Mr. Kaegebehn, did you work on the answer of the National Lead Company to the plaintiff's interrogatories served September 28, 1944?—A. Yes, sir.

Q. Did you collaborate in the preparation of the answers to those questions?—A. I did.

Q. Turning to page 15 of the answer to the interrogatories, where there is an answer to paragraph 2 of the interrogatories by Mr. Knoff, Mr. Kingsbury and Mr. Barton, did you have anything to do with the preparation of that answer?—A. Yes.

2756 Mr. DIXON. I am sorry, I did not get the question.

Mr. WEBSTER. I said did Mr. Kaegebehn have anything to do with the preparation of the answer to question number 2, which appears on page 15 of the answer.

Mr. DIXON. You mean of the answer to the interrogatories that were filed, that is already in evidence?

Mr. WEBSTER. That is right.

Q. And is that also true of the other questions contained in the interrogatories?—A. All except the last one, which I believe is number 7.

Q. How about that one?—A. I think that is purely a commercial question, is it not?

Q. It is.—A. All I did was to receive the information given me and put it in form.

The COURT. You say those interrogatories are in evidence?

Mr. DIXON. They are, your Honor, but not in exactly the same form as the exhibit that Mr. Webster is referring to.

Q. Now, Mr. Kaegebehn, I hand you Exhibit No. 7 for identification and call your attention to the fact that that is a printed copy of the answers of National Lead Company to the interrogatories, on which there have been placed certain notes. Were those notes placed 2757 there by you?—A. Yes, sir.

Q. Are they in your handwriting?—A. Well, that is my printing.

The COURT. Still made by you by your hand?

The WITNESS. That is correct.

The COURT. All right, it is your handwriting.

The WITNESS. Yes, sir.

Q. I thought you called that lettering.—A. I believe that is right.

Q. Not printing. Now, first directing your attention to the notes on the righthand side of each of these pages, what are those notes intended to show?

The COURT. Has this paper been marked for identification?

Mr. WEBSTER. It has been. It is Exhibit No. 7.

The COURT. But the paper with the notes has not been marked for identification?

Mr. WEBSTER. Yes, it has.

The COURT. Government's Exhibit 7?

Mr. WEBSTER. No. This is National Lead Company Exhibit 7.—A. They are intended to show very briefly what the context of the patent is. They are in the nature of explanatory titles.

Q. So that if a person were to go through this 2758 page by page and look at the notes in your handwriting on the righthand side of the page, he would get in as few words as possible your understanding of the substance of each of these patents, is that correct?—A. That is correct.

Q. Now, those statements are so brief that you would not regard them as an entirely satisfactory description

of the patent, would you?—A. No, indeed. They presuppose some prior knowledge of the subject matter.

Q. Now I notice next to each of the patent numbers here, or next to a great number of them, you have either a single check or a double check. What are those intended to show?—A. They are intended for my reference. They tell me in which of two collections of digests I might find that particular patent more detailed.

The COURT. Are you going to take us in on the code?

The WITNESS. I said they tell me—

The COURT. I know they tell it to you, but are you going to give the secret of the code so that we too might know in what collection you are referring to?

The WITNESS. I have the—

The COURT. What does that one check mean?

The WITNESS. That means they are in what I call my T. case digest.

2759 The COURT. What does the double check mean?

The WITNESS. That means that it is described in some notes on the patent aspect of this case that I prepared for Mr. Webster.

The COURT. They don't refer to documents in evidence?

The WITNESS. No, sir.

The COURT. All right.

Q. On the lefthand side of the page of a number of these pages you have placed in your handwriting the word "used." Now, where you have done that have you had in mind any particular definition of the word "used"?—A. As I have indicated on the first page, "used" means commercially used.

Q. If I may refine the definition a little further, what is meant by the expression "commercially used"?—A. Well, there I borrowed from our patent terminology and used that phrase somewhat equivalently to what we understand to be a public use, in the sense that if it got into the plant process and the product resulting therefrom was sold I would call that a commercial use of the invention.

The COURT. As opposed to experimental laboratory or model construction?

The WITNESS. That is correct, sir.

2760 Q. Directing your attention to page 2 in the left hand column, and perhaps elsewhere in this Exhibit 7 for identification, you have the expression "use patent." To what does that refer?—A. That refers to a patent covering a composition containing titanium dioxide or a way of using titanium dioxide or titanium pigment.

In other words, uses to which the products made by our National Lead Company, that is the titanium product, could be put.

By the COURT:

Q. You do not mean process patents?—A. Well, if, for instance, there was a patent covering a method of making paints.

Q. That would be a process patent.—A. That is right, but I would call it a use patent, because it would be a method for utilizing titanium pigment.

Q. There is no such terminology as "use patent" in the patent law?—A. That is right.

Q. You point that phrase to serve your purpose?—A. That is correct.

By Mr. WEBSTER:

Q. Now, there has been a reference before here to so-called T. cases, and I have undertaken to make statements about T. cases. I would like to ask you to explain to the Court just what you mean by, first, the expression "T. case" and then the significance of the T. numbers 2761 attached to a number of the patent numbers on this exhibit number 7.—A. The T. case number is a designation used by the National Lead associated titanium companies to designate a particular invention, and all patents and applications covering that invention, no matter where filed throughout the world, are designated by that number. For example, if we apply for a patent in the United States we send a copy of that to Titan Company in Paris. They designate that case with a T. case number and henceforward every other application, no matter where filed, and every other patent issued covering that invention is designated by that T. case number.

By the COURT:

Q. That is your filing scheme?—A. That is correct. Now as I use it here alongside of a United States patent, it indicates the T. case number of the invention and if one goes further into these pages where foreign patents are listed and finds that T. case number it is at once evident that foreign patent covers the same invention as the United States patent.

Q. It would not necessarily mean that the two sets of claims are verbal identities?—A. No, sir; it means substantially the same.

By Mr. WEBSTER:

Q. So that to the extent that the same T. case number appears in this Exhibit No. 7 more than once, that is a symbol, a designation of the issuance of a patent elsewhere covering the same invention?

The COURT. Not necessarily.

Mr. WEBSTER. Covering substantially the same.

The COURT. I say not necessarily indicating it has been filed. It simply means it has been identified with a tag so, if filed elsewhere it would still be identified elsewhere in their private filing system by that number.

The WITNESS. That is right.

Mr. WEBSTER. That is much more accurate.

Q. Now, Mr. Kaegebehn, if you will look at page 7 of National Lead Exhibit 7 for identification, the word "abandoned" appears after a number of the patent application dates. What does that signify?—A. Without reference to the individual files of each case I could state in a general answer to your question that it means we were unsuccessful in convincing the Patent Office to grant us a patent.

Q. Are there any other ways in which the word "abandoned" may be used in this connection?—A. It is used generically and it might cover, for example, a situation where we prosecuted the case to final rejection and perhaps went to the Board of Appeals but went no further. It might mean that after the first action the anticipatory reference cited were so convincing that we just did not continue the prosecution. It would cover any possibility where we failed to get the patent through.

Q. Now are there cases in which subsequent to the filing of the application there was further invention which rendered the prior application less attractive or perhaps even nugatory?—A. That occasionally happens, and I do recall one or two instances in respect of my work with these titanium applications where the original application as filed is found to be defective but further knowledge indicates that it ought to be revived, and that we resort to a procedure known as filing a continuation case and allowing the original to become abandoned.

By the COURT:

Q. In such cases of course you try to retain the original filing date, if you can?—A. To the extent there is common subject matter.

Q. To the extent you can persuade the examiner?—A. That is correct.

By Mr. WEBSTER:

Q. If you will please look at page 5 of this exhibit, there is a note there on the lefthand side with reference to the Canadian patent. Will you explain that to the Court?—A. I am afraid, sir, it does not appear on this one.

Q. I may have an earlier copy. I will withdraw that, then. I note that there is no equivalent patent or 2764 invention indicated with reference to the Canadian patent numbers. Is there any explanation for that?

—A. The explanation is that they were the very early Canadian patents applied for by the Titanium Pigment Company and the Titanium Alloy Company, and the original documents were never in my possession, and I never took the trouble to obtain copies, and hence I have had no opportunity of comparing their equivalency.

Q. Are there any other notes on that that I have failed to refer to that you would like to explain in order to make this exhibit quite clear?—A. On page 8, under the early British patents of Titanium Pigment Company, which do not bear T. case designations I have tried to indicate the United States patents to which they are most nearly equivalent, and that is true of other countries as we go along.

On page 19 and elsewhere where the designation "W" with a number following it appears, those are designations which I used to designate war cases, which could not be circulated between all of the associated Titan companies, particularly applied by the British Titan Products Company, National Lead Company and Canadian Titanium Pigment Company to cases which would pass between them.

Now beginning page 21, the designation "DK" followed by a number appears, and that is the designation 2765 used by the Titan companies for cases originating with du Pont.

On page 17, following the date alongside of certain patents owned by National Lead Company, I have placed initials "I.G." following patents Nos. 1,738,765 and 1,758,472, which indicate that although the National Lead Company owned the patents, and I believe as issued, the invention originated with an employee of the IG Company, and the same situation applies where I have used the designation "A.S.", TG and ICI.

Q. In respect of patents, are you familiar with the expression "stream of developments"?—A. Yes, in a general way.

Q. How would you define that expression?—A. Perhaps you could consider it as the flow of development, inventions, improvements, skill of the art in the line of one's processes, the projection of their activities as they go along; improvements one upon the other, leading ultimately, we always hope, to the most economic and efficient processes and the best possible products.

Q. Now based on your knowledge of the titanium pigment patents that we have been discussing, and applying that definition of the expression "stream of developments", are you in a position to express an opinion as to whether the patents and the applications for patents that have been discussed here in the case of the National
2766 Lead Company are within the stream of development?—A. I believe I am in a position to say that they are, and I do so say.

Q. Are you familiar with the expression "blocking," and "fencing"?—A. I am.

Q. Will you define those expressions.—A. Well, I regard them as loose expressions, but the connotation is usually a bad one. The idea of a blocking patent, when one speaks of a blocking patent, one generally means a patent taken out by someone to place an obstacle in the way of a competitor's development. Now "fencing" is somewhat the same, creating by a series of patents a fence around your competitor so he cannot break out and develop his processes or, say, damming up his stream of development.

Q. To your knowledge has the National Lead Company with reference to applications for patents in respect of titanium pigments ever engaged in the practice of fencing or blocking?—A. No, sir.

Mr. DIXON. Just a minute. I object to the question, obviously.

The COURT. So to the answer, very obviously, too. We will suspend for a few moments.

(Short recess.)

2767 The COURT. Your objection is overruled. That would not prevent you from developing on cross examination that they did not have any competitors to put any fences around.

Mr. WEBSTER. Your Honor is very helpful. In view of your Honor's remark I think I will ask Mr. Kaegebehn one further question.

By Mr. WEBSTER:

Q. Mr. Kaegebehn, I am going to read to you a statement from an opinion of Mr. Justice Roberts in the

Hartford-Empire case and then based on that statement I am going to ask you a question.

The COURT. Is the statement in evidence?

Mr. WEBSTER. Well, I would think that examining a witness of this character I could read him any statement as a basis for an opinion.

The COURT. I was still in a jesting mood. Go ahead as long as you do not ask him whether he agrees with Mr. Roberts' opinion.

Mr. WEBSTER. I shall not ask him that. I think it would be almost accurate to say that this statement is in evidence in one way or another.

Q. "Much is said in the opinion below, and in the briefs, about the practice of the appellants in applying for patents to 'block off' or 'fence in' competing inventions. In the cooperative effort of certain of the appellants to obtain dominance in the field of patented glass-making machinery, many patents were applied for to prevent others from obtaining patents on improvements which might, to some extent, limit the return in the way of royalty on original or fundamental inventions."

Now applying that language to the activities of the National Lead Company, did the National Lead Company ever apply for patents to prevent others from obtaining patents?—A. No, sir.

Mr. DIXON. The same objection, your Honor.

The COURT. Overruled.

The WITNESS. I should like to make a comment to that answer, Mr. Webster.

Q. All right. We will be glad to have you.—A. Where a patent issues and a person has reason to believe that they invented the subject matter of that patent prior to the patentee, it is perfectly proper to file an application to provoke an interference to determine who was the first inventor. We have been involved in some interferences, not with issued patents, but only to the extent that we are contesting the invention on the basis of who invented it first.

Q. Now I am going to ask you to look again at National Lead Exhibit 7 for identification, and ask you if you recall being here when reference was made by Mr. Dixon to a letter from Mr. Thompson concerning the expiration of patents of the Titanium Pigment Company in 1933 or 1934 or 1935? Were you here when that letter was presented?—A. Yes, sir.

Q. And do you recall the substance of that letter?—A. Yes, I think I do.

Q. Now, what was Mr. Thompson's position?—A. He was with the Titanium Alloy Company originally and I think he held an officership or directorship in the Titanium Pigment Company, and it is my recollection this is Mr. Andrew Thompson we were talking about and he was writing to Mr. Evans McCarty and he was saying that our patent position will expire as of a certain date and we had better get busy and push the commercial development of these pigments.

Q. Have you any opinion on that subject?—A. You mean as to his letter?

Q. Yes.—A. Well, I think he failed to recognize that there would still be in force beyond the date that he had in mind, which I believe was between 1932 and 1934, the fact that there would still be in force important patents.

Q. Now in fact would any patent that was used according to your definition after those dates be regarded as an important patent?—A. Yes, indeed.

Q. Now will you point out examples of patents that were in use after that date which, in your opinion, 2770 are important patents and indicate the expiration dates?—A. In general any patent which I have designated in the left as having been used which expired after that date would be considered by me of importance. Some of those had more importance than others, and I point particularly to page 3, just above the printed designation "B" to the case marked T.47, patent No. 1,859,027, which was issued November 29, 1932, and there I might add that the application was filed some years prior on an invention made even earlier than that, so that that case was, in my mind, unquestionably in existence at the time Mr. Thompson wrote his letter, and the patent was issued to Mr. W. F. Washburn and I have designated that it covered tank digestion, by which I mean covers the method of attacking the ore with sulfuric acid in a specially constructed apparatus. It is used universally, as I understand it, by all the companies that make pigments based upon a process where sulfuric acid reacts with the ore. It is a very important patent in my opinion.

Q. Have you in mind any other examples? I don't want you to spend too much time on it.—A. In my opinion I would regard, on the same page, a little further down under the heading "B" cases designated T. 77A and T.78. Now those patents issued in 1933. They were filed in 1929 and they cover the composite titanium dioxide, 2771 calcium sulfate pigments which we market today and they cover them as product claims and method

claims. Briefly they disclose the method of making a most suitable type of calcium sulfate and the use of that in the preparation of the composite, and these inventions had been made and were in existence and the patent cases had been filed when Mr. Thompson wrote his letter.

Now just one more example: At the bottom of the page, the very last case, T.67, an application filed in 1931 in the name of L. W. Ryan and issued as a patent in July 1933—well, it was testified I think by Mr. Barton yesterday that we had a process for making a titanium oxide which in quality could compete with the product of the Commercial Pigments Company. Now this patent T.67 was one of those patents covering that method. Briefly it was a precipitation of the titanium hydrate from a solution by pouring the titanium solution into hot water which contained an organic acid, or an organic acid together with phosphoric acid. So that was an important patent at that time and it was in existence at the time Mr. Thompson wrote his letter.

I might add also that his date was prior to the expiration of some important patents of the Jebsen group.

Q. What ones particularly?—A. As I recall it, his expiration date was fixed between 1932 and 1934, and the very important Titan Co. A/S patents did not expire until 1937.

2772 Q. Mr. Thompson was really looking at this from the standpoint of the Titanium Alloy Company, was he not?—A. In my opinion looking at it from the standpoint of the patents of the Titanium Pigment Company had from the Alloy Company; their own inventions; their own patents.

Q. Mr. Kaegebehn, are there patents and processes for manufacturing titanium pigments other than the, using the words broadly, National Lead process or the du Pont process?—A. Yes, sir.

Q. Can you indicate what those are? I mean just the groups or classes of patents.—A. I am aware of patents which might be said to cover two different processes, one the so-called Burgess process and the other the so-called Muskat process in which the Pittsburgh Plate Glass Company was interested. In addition I am aware of patents relating to the preparation of titanium pigments, but I do not believe could be considered as covering a distinct process.

Q. To your knowledge has the Sherwin Williams Company expended substantial sums of money within recent years in connection with the Burgess process?

Mr. DIXON. I object to that, your Honor. The best evidence would be the records of the Sherwin Williams Company.

The COURT. Yes.

Do you know?

2773 The WITNESS. Yes, sir.

The COURT. How do you know?

The WITNESS. I was told by—

The COURT. Objection sustained.

Q. Have you visited the plant?—A. Yes.

Q. And have you seen the work being done there?—

A. Yes.

Q. And the equipment being used?—A. Yes.

Q. Now I ask the question again.

Mr. WEBSTER. Unless your Honor thinks it is still improper.

The COURT. No, go right ahead.

Q. Can you say of your own knowledge, which was the form of my question, whether the Sherwin Williams Company has expended substantial sums of money in connection with the Burgess process?

Mr. DIXON. I still object to the question and ask this witness if he knows of his own personal investigation, whether that is the fact.

The COURT. He has testified that he made a personal inspection and that he saw the equipment, and I think he ought to be permitted to draw the rather common inference that large pieces of machinery cost money and therefore involves substantial expense. Go ahead.

A. My visit was in the year 1938, made to their plant at Gloucester City, New Jersey. They had bought a
2774 rather large piece of property, it was formerly a shipyard, and they had converted one of the buildings to a pilot plant, and then they continued their activities for quite a few years before they abandoned that. I understood that they have now discontinued their activities. Basing my answer on what I saw, I should say up to that time they must have put in several hundred thousand dollars. That is, the year 1938.

Q. Have you any personal knowledge of expenditures made by the Pittsburgh Plate-Glass Company in connection with their process?—A. No, sir.

Q. Were these other processes and patents to which you have referred offered to the National Lead Company?—A. The Burgess process as covered by the Svendsen patents were offered to the National Lead Company. We also had

an option to acquire rights in the Muskat patents of Pittsburgh Plate Glass.

Q. Did you reject the suggestion that you buy the Burgess process, the Burgess patents?—A. We did.

Q. Did you give up your option on the Pittsburgh Plate Glass process?—A. We did.

Q. Was there any reason for that?—A. Yes. Neither process seemed to add anything to what we were doing; they didn't possess sufficient interest.

Mr. WEBSTER. If the Court please, I should now 2775 like to offer in evidence National Lead Exhibits for identification 3, 4, 5, 6 and 7.

The COURT. Is there objection?

Mr. DIXON. Your Honor, we object to No. 7. We must state that we have been somewhat overwhelmed by the mass of information which is contained on that exhibit. It seems to us that the best evidence, if this is to be offered in evidence at all, would be the patents themselves plus this exhibit. Obviously, we have not had an opportunity to check into the various comments made by this witness on the patents that are listed in this exhibit which number far in excess of 500 or so. It would seem to us that if it is to be offered the patents should also be made a part of the exhibit itself.

The COURT. Well, for the reasons that I indicated on yesterday I think I shall overrule your objection. Manifestly, since this witness testified that he prepared this memorandum, nobody could seriously object, considering the large volume of material it represents, if he used this document to refresh his recollection. And, in an antitrust suit without a jury I am not going to stand on the punctilious application of the rule that we can only use it one way and that we can't read it directly.

The exhibit will be received and so will the others. 2776 (National Lead Exhibits 3, 4, 5, 6 and 7 for identification received in evidence.)

Mr. WEBSTER. That is all.

Cross examination by Mr. DIXON:

Q. Mr. Kaegelbehn, I believe you stated that you examined the Burgess process and also one in which National Lead did some work with the Pittsburgh Plate Glass Company. That is correct, is it?—A. I don't think I said that National Lead did any work with them.

Q. Well, it is a fact, is it not, that, with reference to the Pittsburgh Plate Glass Company, the National Lead

Company had an option on that process with the Pittsburgh Plate Glass Company and, in conjunction with that company, spent considerable money in investigating that process and finally dropped it; that is a fact, is it not?—

A. I don't think we spent any money in conjunction with them. We paid them each year for I think two years a certain sum of money to keep the option alive, and we spent certain moneys testing the products which they submitted to us.

Q. In any event National Lead spent some money on this Pittsburgh Plate Glass process, so-called, for the purpose of simplicity, and finally dropped its interest in it; that is correct, isn't it?—A. That is correct.

Q. With reference to the Burgess process, so-called, that was investigated by National Lead as early as 1935
2777 and 1936, wasn't it?—A. That is correct, as I recall it.

Q. You found it not of interest to National Lead Company at that time; is that correct?—A. That is right.

Q. Or any subsequent time?—A. That is right; that is my recollection.

Q. So that we can say as a practical matter that the sulfuric acid process which is the one, for the purposes of simplicity, that we will describe as being used by National Lead and du Pont Company, and Virginia Chemical Company and the American Zirconium Corporation, is the only process used commercially in the United States today, is that correct?

Mr. WHITNEY. Your Honor, I object to the question as assuming facts not in evidence.

The COURT. It is admissible. He is asking the question is that so.

The WITNESS. I don't understand just what the question is, Mr. Dixon.

The COURT. All right, you had better reframe your question.

Q. You have described the two processes, the Burgess process and the one on which some investigation work was done by Pittsburgh Plate Glass Company, is that correct?
Pittsburgh Plate Glass Company is not manufacturing titanium pigments under that process, are they,
2778 today, to your knowledge?—A. To my knowledge they are not.

Q. And as far as the Sherwin Williams Company is concerned, you say that to your knowledge they spent some money on the Burgess process. Are they producing to

your knowledge a satisfactory product under that process today, the ammonium chloride process, so-called?—A. No, sir.

Q. So that eliminating those two processes, is there any other process than the sulfuric acid process, so-called, for purposes of simplicity, used by any other company in the United States today in the manufacture of titanium pigments?—A. Not that I know of.

Q. So that of the companies engaged in the production of titanium pigments in the United States today they are the National Lead Company, the du Pont Company, the American Zirconium Corporation and the Virginia Chemical Company; is that correct?—A. That is correct.

Q. And from your knowledge as a patent official of the National Lead Company, all of those companies named use what we will call the sulfuric acid process; is that correct?—A. That is my understanding.

*Q. That is to say, that is the basic element used to attack the ilmenite from which, after various operations are gone through, that you finally get a titanium pigment product; is that correct?—A. That is correct.

Mr. WHITNEY. Would you just repeat that question?

2779 (Question read.)

Mr. WHITNEY. I still don't know what the question means.

The COURT. It is not necessary for counsel to understand it, it is only important that the witness should understand it. Go ahead.

Mr. DIXON. What was the answer? —

(Answer read.)

Q. Now as head of the Patent Department of National Lead Company, you testified you were in charge of the preparation and filing of patent applications for the company; is that correct, Mr. Kaegerbehn?—A. Yes.

Q. State, if you know, whether, when an application for a patent is filed with the Patent Office, the substance and the material contained in that application is available to the public generally?—A. It is not.

Q. In other words, there is no information available from any patent application to the public until the patent is issued; is that correct?—A. That is correct.

Q. Now in the preparation of your applications for patents in the titanium business in the United States for National Lead Company, you of course have access to certain information from your own company on which you

base your application; is that correct?—A. Information concerning the invention which I am—

Q. That is right, on which you base your application.—A. That is correct.

Q. Would you say it would be helpful to you in preparing that application to also have available to you information from other companies in the same business?—

A. I don't understand that question.

The COURT. You mean the prior art?

Mr. DIXON. That is right.

Q. The technical experience or exchange of technical information, would that be helpful to you in determining whether or not, first of all, you were dealing with patentable subject matter?

The COURT. I will take the judicial notice that if he knows the extent of the prior art it will help him to decide whether or not a new process or a process that he has developed is an advance over the prior art or not.

Mr. DIXON. I am sorry, I did not get the answer.

The COURT. The answer is that I take judicial notice of the obvious, that if you know the prior art you know the prior art.

Q. Well, in preparing an application to be filed, Mr. Kaegbehn, in the titanium pigment field, would it be helpful to you in preparing that application to have copies of proposed applications available to you from other companies in the industry—

Mr. WHITNEY. Your Honor, that is objected to on the ground that—

2781 Q. —relating to the same subject matter?

Mr. WHITNEY. —it is outside the issues in the case, as there is no issue made as to whether or not Mr. Kaegbehn has available to him proposed applications, and that the Government has not proved that he does have available to him proposed applications of the du Pont Company, and the Government has affirmatively proved that he has not for many years had available to him proposed applications of the du Pont Company.

The COURT. When you say "proposed applications," are you distinguishing that from "applications"?

Mr. WHITNEY. Yes, I am.

The COURT. I don't know whether counsel intended it.

Mr. WHITNEY. I don't know what he intends. I have to take his word.

The COURT. I don't know what the words "proposed applications" mean. I will sustain the objection and let

you reframe your question.

Mr. DIXON. All right, your Honor.

Q. Do you recall the blended pigment application matters, Mr. Kaeghebeln, with the du Pont Company?—A. Yes, sir.

Q. Is it a fact that in connection with the negotiations relating to that matter which resulted in the execution of a license from du Pont to the Titan Company in 1937 2781a of a blended pigment application that that application had been filed outside of the United States at the time the information relating to that application in the United States had been filed in this country?—A. I don't understand that, Mr. Dixon.

The COURT. I share your predicament, so we will ask Mr. Dixon to reframe the question.

Mr. DIXON. I am sorry, the question is rather involved. I will withdraw the question and reframe it.

2782 Q. Were there any foreign patent applications filed on the blended pigment patent?—A. Yes, sir. There were foreign applications filed corresponding to the United States application covering the invention of making blended composite pigments.

Q. And were these applications filed abroad at the time the patent application on the blended pigment matter was made available to you by the du Pont Company in the United States?—A. I do not know.

The COURT. Are you trying to find out whether he was able to see the application before the patent issued?

Mr. DIXON. That is right.

The COURT. Did you see the application before the patent issued?

The WITNESS. I saw the United States application.

The COURT. You saw the United States application before the patent issued?

The WITNESS. Yes, sir.

The COURT. All right.

Q. Based upon that application, you prepared for Titan Company certain applications which were thereafter filed in foreign countries; that is a fact, isn't it?—A. No, sir.

Q. Who prepared those applications which were subsequently filed in foreign countries?—A. The situation 2783 with respect to the blended pigment patent cases—

Q. I understand. I am asking if you can answer my question: Who prepared those applications which were filed in foreign countries? Can you tell the Court?—A. Du Pont.

Q. And they were transmitted to you?—A. No, sir.

Q. Will you state to the Court, then who filed those applications?—A. Du Pont.

Q. And the applications for filing in foreign countries then were transmitted to you, or, I mean, were transmitted directly by du Pont for filing?—A. That is correct.

The COURT. Through their own patent agents abroad?

The WITNESS. Yes, sir.

The COURT. All right.

Q. Was that procedure followed in the subsequent licenses to the Titan Company in 1938?—A. Subsequent licenses—

Q. Of certain applications, patent applications, of the du Pont Company?—A. Other than the blended pigments?

Q. That is right.—A. No, it was not.

Q. What was the change in the procedure that followed in the filing of those applications in the foreign countries in the 1938 license from du Pont to Titan?—A. Subsequent to the blended pigment case—

Q. That is right.—A. Du Pont would send to me as assistant secretary of Titan, Inc., copies of their 2784 applications filed in the United States. I in turn would send those copies to Paris to Titan Company, Inc. there, who in turn would send copies to the associates of Titan, Inc., namely, British Titan Products, Societe Industrielle, Titan Gesellschaft, and others, and Titan Company A/S; and in due time they would inform me that their associates would like to have a corresponding application filed in a certain country. I would so inform du Pont and endeavor to obtain their consent to this. And if I obtained their consent I would so advise Titan Company, Inc., who in turn would prepare the application and forward to me the necessary papers for execution, which I would transmit to du Pont for execution. That is the way the procedure would work out.

Q. Now, after 1938 were the patent applications of the Titan companies made available to the du Pont Company in the United States before they were filed in some instances?—A. They were made available to the du Pont Company after June, 1938.

Q. Even before they were filed in some instances in the United States?—A. Not before they were filed, no, sir.

Q. Well, in any event they were made available to them before any patents were issued; that is a fact, is it not?—

A. That is correct.

2785 Q. And they were not thus available to any other companies in the industry, that is the Virginia

Chemical company—were they made available to them?—

A. No, sir.

Q. Were they to your knowledge in all cases made available to American Zirconium Corporation?—A. No, sir.

Q. So that the du Pont Company was the only company who had access, shall we say, to the patent application of Titan Company, Inc. in this country before any patents issued?—A. That is correct.

Q. Now in connection with this matter of patent applications, would you say it would be of assistance or value to a research department of any company engaged in the titanium pigment business to have access to the material contained in a patent application prior to the issuance of any patent by the United States Patent Office?—A. It might prove helpful.

Q. It is a fact, is it not, that it would indicate to that patent department information which in turn might be transmitted to the research department of that company, what you have called the stream of development in this industry; that is a fact, isn't it, Mr. Kaegebehn?—A. I think your last question was, would it be helpful to a research department to have access to this knowledge contained in applications, and I said it might be. Now you are saying something about a patent department, and I don't understand the question, this last one.

The COURT. Well, manifestly, it might have caused a germination of an idea in the mind of an investigator when he sees what somebody else has done in the field, of course.

The WITNESS. Yes, sir.

The COURT. Or he might see about the same time, if he had been struggling with the problem, that it has been solved by someone else, and he sees what has been done. He finds that out three or four years ahead of the time that he would find out if he waited until the time came up.

The WITNESS. Just so.

The COURT. These things are more or less self-evident. I should imagine.

Mr. DIXON. All right, sir.

Q. The two companies that I have previously referred to, the American Zirconium Corporation and the Virginia Chemical Corporation, do they manufacture composite pigments to your knowledge?—A. It is my understanding that the American Zirconium did; I do not know whether it is manufacturing any titanium pigments today. It had

suspended operations sometime ago; but I don't understand that the Virginia Chemical does, although I am not clear on that at all.

Q. Well, now, you mentioned a so-called Washburn patent 1,889,027; is that correct?—A. I would have to see it, to find if you give me the correct number. It is the Washburn tank digestion, I refer to.

Q. That was the patent I think you said was perhaps overlooked by Mr. Thompson when he wrote the letter that you mentioned, which patent was issued in November of 1932, as I recall your testimony.—A. That is right. The patent number is 1,889,027.

Q. The National Lead Company was manufacturing principally—well, manufactured, in 1932, composite pigments, wasn't it?—A. Yes, sir.

Q. And also what we call a pure pigment?—A. Its pure pigment business at that time, as I understand it, was a rather small part of its business.

Q. Well, the substantial portion of the business of National Lead at that time was in the composite field, wasn't it?—A. That is correct.

Q. Say, in 1932?—A. That is correct.

Q. If had been, though, manufacturing a pure titanium pigment so-called prior to that time in some quantity, some amounts?—A. Relatively small amounts, as I understand it.

Q. Now the Washburn patent so-called, which you have referred to, was that used in connection with the manufacture of a pure pigment or of a composite pigment or both?—A. Both.

2788 Q. So to that extent it was more or less what you call one of these improvements in the field of the manufacture of titanium pigments—an improvement patent; is that correct?—A. It has been brought out here that—well, in one sense Yes and in another sense No.

Q. Well, in what sense was it an improvement then? Let us take it that way.—A. It was an improvement in the art of reacting ilmenite with sulfuric acid. Now, from the practical point of view it was considerably more important because it enables one to carry out several steps, initial steps, in the one device. So, economically and technically it was much more than a mere improvement.

Q. How long were you using that patent? National Lead Company of course was manufacturing and producing composite pigments without using the Washburn patent so-called prior to the date of the issuance of that patent, wasn't it?—A. Yes.

Q. And without using the so-called Washburn digestion tank or whatever description you want to place upon the use of that patent— A. The best answer I can give you is that we adopted it as soon as Mr. Washburn reduced it to practice.

Q. Well, it was in a sense, then, an improvement in the method manufacturing either a TiO_2 or a composite pigment, is that correct? Would that be a fair statement?—A. It was a decided improvement.

Q. Do you know whether Virginia Chemical Company, for example, was manufacturing a TiO_2 and was using the Washburn process?—A. Yes.

Q. Is it using the Washburn process, I mean this patent that you have described that Mr. Thompson overlooked?—A. In my opinion, yes.

Q. And you notified them of the infringement application or gave them notice of infringing that patent in 1936 or thereabouts, did you?—A. Yes.

Q. Nothing further was ever done by the National Lead Company in enforcing that patent or in determining its validity, was there, Mr. Kaegebehn, by National Lead Company as against the Virginia Chemical Company?—A. We didn't litigate it against Virginia Chemical.

Q. Do you know the reason why no litigation was filed to enforce the alleged infringement of this Washburn patent that you say was overlooked by Dr. Thompson in 1932?—A. I don't know the reason.

Q. Did you ever recommend the bringing of suit to determine the validity of that patent in the courts of the United States?—A. I pointed out to our officials that in view of the disagreement as to infringement and non-infringement, they were perhaps letting an important patent go infringed.

2790 Q. So in this particular instance, as far as you know, to your knowledge, this so-called important patent overlooked by Dr. Thompson in 1932 was never even passed upon by any court, is that correct?—A. It has never been litigated.

Q. And your company, as far as you know, never saw fit to have the validity of that patent passed upon by any competent court in the United States?

Mr. WEBSTER. Your Honor, I hesitate very much to object—

The COURT. I sustain the objection. It is repetitious.

Mr. WEBSTER. Repetitious, and that the answer would be immaterial.

Q. Do you know why the National Lead Company was not interested in adopting or acquiring either this Burgess process or the Musket process that you have described, Mr. Kaegebehn?—A. As regards the Musket process, after two years we came to the conclusion on the basis of our examination of the quality of the products periodically submitted to us, that it was not potentially valuable as far as we were concerned.

Q. Nor commercially feasible; is that correct?—A. Yes, I think that is correct.

Q. Is that also true of the Burgess process, from 2791 your investigation of it?—A. That is substantially correct, too.

Q. From your investigation of these processes as a patent man, can you state to the Court what in your judgment was wrong with those two processes?—A. That is not the opinion of a patent—

Q. I am sorry, I did not get your answer.—A. That is not the opinion of a patent man, to say what is wrong with the process.

The COURT. He said they did not produce a sufficiently good product.

The WITNESS. I was not speaking then as a patent man, sir. I was speaking as a technical—

Q. Can you describe the process to the Court so that he will have some notion of what they were?

The COURT. How much good will that do?

Mr. DIXON. All right. I will withdraw the question, your Honor.

Q. The exchange of patent applications also took place between the du Pont Company and the National Lead Company on patents filed by either of those two companies in the United States before issued, did it not?—A. Yes.

The COURT. In the field of titanium products.

Mr. DIXON. That is right.

The WITNESS. That is correct.

2792 Q. Do you know to what extent the research information or technical information was exchanged between these two companies before—or during the years up till the time it was terminated, in 1940?—A. Will you repeat that, please?

Q. Technical information, exchange of that information. Do you know to what extent?—A. Yes, I know.

Q. Well, can you state to the Court in a general way what that covered and included?—A. As finally determined, it included knowledge as to developments for which

\$5,000 had been set aside to be spent, or spent on; and knowledge of any developments that had gone into plant process. But it excluded pure research. I shouldn't say "pure research." It excluded the activities of the research laboratories until the development had had \$5,000 spent on it, or during the time, to be spent on it, as I understand.

Q. So that I am clear on it, you say that information in the research departments of the two companies was not exchanged until \$5,000 had been spent on research on a particular matter, is that correct?—A. I am not clear whether the \$5,000 had to be spent or whether if it was to be set aside to be spent, exchange took place.

Q. Do you know of your own knowledge what kind of information was made available to the National
2793 Lead Company by the research department say of du Pont Company?—A. Well, if the research was a project upon which this \$5,000 had been spent or, as I said, maybe set aside to be spent on it, then my understanding is that it was exchanged.

Q. Did you ever have any conferences with any representatives of the du Pont Company with reference to proposed patent applications on matters in which the two companies were engaged in research work?—A. Only to the extent that the proposed application had a relation to one already filed.

Q. You have testified, I believe, that there was to your knowledge some exchange of technical or research information between the two companies, but the extent to which it was exchanged you are not certain.—A. That is clear, that is right.

Q. Would you say that the exchange of such information would be of assistance to your research department or your development department in aiding perhaps in the volume that might be poured into the stream of development that you have described?—A. Yes.

Q. And this information, to the limits that you have defined or mentioned, was not available to the Virginia Chemical Company by your company, was it?—A. We had no agreement with Virginia Chemical at all.

2794 Q. And you necessarily, therefore, did not exchange even very minor, so-called—or, you didn't exchange any kind of technical information with the Virginia Chemical Company?—A. No, sir.

Q. Do you recall whether or not the American Zirconium Corporation was, for example, able to witness the

Washburn attack in your plant after having requested so to do?—A. They were not.

Q. And would that information, secured by being able to witness what we called the Washburn attack, be of assistance to anyone else in the same business, in enabling them to overcome any difficulty that they might have in manufacturing titanium pigments?—A. It would be helpful.

The COURT. That is why he did not let them see it.

The WITNESS. No; there is another explanation for that.

The COURT. I mean, if it were innocuous he wouldn't have made any point about it.

Mr. WEBSTER. That is not true, your Honor.

The COURT. All right. I withdraw it.

Mr. WEBSTER. I will reserve a question on that for the witness.

Q. How many patents relating to the titanium pigment business would you say have been issued to the National Lead Company and the du Pont Company in this country?—A. I have no idea. I never counted them.

2795 Q. Do you know how many are in effect today, Mr. Kaegebehn?—A. No, sir.

The COURT. Can you get them from counting them off on Exhibit NL-7?

The WITNESS. Yes.

The COURT. Do that during the recess.

Q. And when you do that, Mr. Kaegebehn, would you also count off the number that are used by the National Lead Company?

Mr. WEBSTER. I thought your Honor was suggesting that Mr. Dixon might count them off.

The COURT. I was addressing myself to Mr. Dixon. The document is in evidence.

Cross examination by Mr. WHITNEY:

Q. Mr. Kaegebehn, with reference to du Pont patent applications, you do not today receive proposed applications not yet filed, do you?—A. No, sir.

The COURT. Are you using the words "proposed applications" as distinguished from applications?

Mr. WHITNEY. Yes.

The COURT. What is a proposed application?

Mr. WHITNEY. That was the only question during the entire examination that I objected to.—A. Proposed application would necessarily, in my view, be one not yet filed.

2796 The COURT. I thought that meant it was abandoned and withdrawn. If you want to use it, go ahead unless you define what you mean by it and you and the witness get together.

Mr. WHITNEY. Well, your Honor, this is not going to be a very long examination.

The COURT. Very well.

Mr. WHITNEY. I am going to try to convey to your Honor what I think are facts upon which there never had been any dispute before this witness took the stand but in respect of which I was afraid the prior cross examination would mix us up, because the prior cross examination never made any distinction as to dates, except in one minor particular. That is the vital point about all this.

The COURT. Go ahead.

Q. I mean by proposed patent applications, Mr. Kaegbehn, applications not yet filed. Is it to that meeting that you responded that you do not now see proposed du Pont applications?—A. We do not today nor did we ever receive proposed applications, meaning in the sense of applications not yet filed.

Q. You never received them?—A. No, sir.

Q. Do you today receive du Pont applications six months or later after their filing?—A. Yes, sir.

2797 Q. And has that been the rule since the first of 1941?—A. Yes, sir.

Q. Under the existing agreement with du Pont you receive a non-exclusive license to operate under that patent, to operate the invention described in that application, do you not?—A. Yes, sir.

Q. And reciprocally, you provide du Pont with your patent applications not less than six months after their filing; is that correct?—A. We mail them out six months from the filing date.

Q. Are these always exchanged immediately upon the expiration of six months or are they sometimes delayed?—A. The understanding is that it should be six months. I have inadvertently let the period go longer, and occasionally I get them maybe one or two weeks after six months from du Pont.

Q. Your relations with du Pont are governed today by the agreement of January 1, 1941, Exhibit E-3, are they not?—A. Well, January 1, 1941, is an amendatory agreement.

Q. Yes.—A. I would say they are governed by the agreement of January 1, 1933, as amended in January 1, 1941.

Q. Right. I accept your correction. And that you would say?—A. Yes.

2798 Q. Turning now to the nature of the process operated at du Pont; you testified that both du Pont and National Lead attack the ilmenite along similar lines; is that correct?—A. Well, I don't get the context.

Q. Would you phrase it in your own way?—A. Both du Pont and National Lead Company, according to my knowledge, practice the digestion which I call the Washburn tank digestion process.

The COURT. With the use of sulfuric acid.

The WITNESS. Yes, sir.

Q. I do not want to confine the present questions to Washburn. I am talking now about the general and overall nature of the process or processes. And I understand that you say that they have a similar method of attack?—

A. Yes, that is correct.

2799 The COURT. Yes. The method of attack of course is one short stage in the process.

Mr. WHITNEY. Thank you, your Honor. That makes my cross examination much shorter, because it was going laboriously to prove that point.

The COURT. The attack deals with the handling of the ore in the first state.

The WITNESS. It solubilizes it. It makes it soluble.

Mr. WHITNEY. I think the record will show that that was the only part of the process to which the question was directed and the answer given.

The COURT. Correct, and I was not deceived.

Q. Your knowledge of the du Pont operation is based upon the operation as it was in effect up to the spring of 1940, is it not; so far as it is knowledge as distinct from hearsay?—A. That is correct.

Q. Has opportunity or invitation been given to you or to other officers or representatives of National Lead or Titan Company to visit and inspect and examine the du Pont plants since that time?—A. Not to my knowledge.

Q. The Washburn patent to which you referred was only one of a great many patents, one which you selected as an example of your view that Mr. Thompson had either been wrong at the time in 1932 or had subsequently been
2800 proven wrong in considering that all important patents would expire by 1934, is that not right?—

A. Yes; I chose that as an example only.

Q. Does your company today exchange any technical information with American Zirconium Corporation?—A.
No, sir.

Q. Did your company ever exchange technical information with American Zirconium Company?—A. Yes, sir.

Q. When did that cease?—A. In the spring of this year the American Zirconium agreements were terminated in conjunction—

The COURT. Spring of this year?

The WITNESS. Yes, sir.

Mr. WHITNEY. 1944.

The WITNESS. I beg your pardon.

Mr. WEBSTER. March, 1944.

Q. Did Virginia Chemical Corporation at any time ask your company to exchange information with it?—A. Virginia Chemical?

Q. Yes.—A. No, sir.

Redirect examination by Mr. WEBSTER:

Q. To your knowledge did the Zirconium Company install a Washburn tank?—A. Yes, sir.

Q. And did it use the Washburn tank?—A. Yes, sir.

Q. And did it get any assistance from us in the use 2801 of the tank?—A. It did.

Q. What assistance did it get?—A. It got blue prints, services of our engineers who assisted them in the installation of it.

Q. Did men familiar with the Washburn tank process spend time, that is, men from the National Lead Company, spend time with the Zirconium Company, teaching the Washburn tank attack?—A. They did.

Q. And was assistance of that sort ever denied to the American Zirconium Company?—A. Not to my knowledge.

Q. Was anything denied except the actual inspection of the manufacture of titanium pigments in the plant of the National Lead Company?—A. According to my knowledge that was the only denial.

Q. And what was the reason for that?—A. We had installed in our plant many of the developments of du Pont under our license agreement and we were not in position to give them access to that information, that kind of information.

Q. Was there some difference of opinion in your own organization as to what you should do about that?—A. Well, I think I differed some. I thought perhaps we could go a little beyond what we did, but I did not have to make the decision.

Q. In that respect Mr. Garesche was your superior 2802 officer?—A. That is correct.

Q. And it was for that reason that you have

assigned that he declined to permit the Zirconium Company to inspect the actual manufacture of titanium pigments in your plant?—A. That is my understanding.

Q. Do you recall the negotiations with the Virginia Chemical Company?—A. Yes, sir.

Q. And did you have some part in those negotiations?—A. I did.

Q. And did the National Lead Company ever refuse to grant a license to Virginia Chemical Company?—A. No, sir.

Q. Did it ever refuse to grant the Virginia Chemical Company a license to use the Washburn tank?—A. I must answer that this way: we never refused to license them under our patent, but we said that we were prevented by our contractual obligations from licensing them under individual patents of our group.

Q. Did you consider the Washburn patent a valid patent?—A. Yes, sir.

Q. Did you, as a patent lawyer—and this is in connection with a number of Mr. Dixon's questions—consider that it was necessary to bring an action of some sort to determine the validity of the Washburn patent?—A. I considered it to be valid as issued.

2803 Q. As a patent attorney, don't you know that the question of validity is normally raised by way of defense to an action for infringement?—A. Yes.

Q. Now when you described the Burgess and Muskat processes in answer to Mr. Dixon's questions, you were referring to the value of those processes or patents from the standpoint only of the National Lead Company, were you not?—A. That is correct.

Q. And they were not considered as attractive because they added nothing from that standpoint of value?—A. That is correct.

Q. And your answer was limited to that particular point of view, is that correct?—A. Yes, sir.

Mr. WEBSTER. That is all.

The COURT. Is there anything further, Mr. Dixon?

Mr. DIXON. Just a moment.

The COURT. We will adjourn now and resume at two-fifteen.

(Recess until 2:15 p.m.)

2804

AFTERNOON SESSION

CHARLES F. KAEGBEHN, resumed the stand.

Recross examination by Mr. DIXON:

Q. Mr. Kaegbehn, you were asked by Mr. Whitney as to whether or not under the 1933 contract as amended you were now exchanging patent applications only within or after six months from the date of filing, is that correct?—A. I believe so.

Q. Now from your experience in the patent work will you state to the Court how long an interval of time elapses, on the average, between the filing of an application for a patent and the issuance of that patent in the titanium field?—A. It varies so widely—

The COURT. Several years would be as fair a guess as any?

The WITNESS. Yes. That would be all right.

Mr. DIXON. That is all.

Redirect examination by Mr. WEBSTER:

Q. Are you in a position as a patent attorney to give your opinion as to what Titan Co. A/S had to offer, patentwise to the Titanium Pigment Company?

The COURT. In 1920 I assume?

2805 Mr. WEBSTER. In 1920, yes.

A. In my opinion they had to offer a process that was complete from the initial step to the final step for making relatively pure titanium dioxide, and that process, in my opinion, was chemically and technically very important and interesting.

Q. What, in your opinion, did the Titanium Pigment Company have to offer Titan A/S patentwise?—A. A process which started with a titanium solution made, for example, by the fusion method described by Mr. Barton or, for instance, prepared also by the Jebson attack, for making composite titanium pigments which was very important in those days. As Mr. Barton testified at that time they were concentrating their commercial development on composite pigments.

Q. In 1933 what, in your opinion, did the Titanium Pigment Company or the National Lead Company have to offer du Pont?

Mr. DIXON. If the Court please, I object to the question. I think that is a matter for the Court to determine.

The COURT. Really, yes. It is argument, but I suppose if Mr. Kaegbehn wanted to get off the stand and make

that argument I would listen. I am not going to draw the line because he happens to be facing the bar 2806 instead of the other direction.

Go ahead, Mr. Kaeghehn.

A. I should answer that question this way: I think that Dr. Blumenfeld had made a very important contribution—important is my opinion—in this art, particularly what has been referred to here as the seeding hydrolysis. We can perhaps look at that as the method for causing to exist in the titanium solution minute centers or nuclei around which the titanium in the solution can grow, and finally fall out as a precipitate. It enabled a control of the hydrolysis procedure. Now that contribution was in the hands of the Commercial Pigments Company and came into the hands of Krebs. We had the contribution to offer that they could avail themselves of this Titan Co. contribution, the Jebson attack, the hydrolysis of concentrated solutions in conjunction with the Blumenfeld contribution, plus the Goldschmidt calcination. In other words, the Blumenfeld and this contribution we had enabled them to operate that process. They, in turn, had to offer us this Blumenfeld contribution and, with some minor differences, certainly shortly after the agreement of 1933, both companies operated a substantially identical process; that is to say, we adopted the Blumenfeld precipitation plus other things perhaps of minor importance, the salt calcination, and they adopted 2807 these contributions that were contained in the Jebson or Titan Co. A/S patents which we had.

I might also mention the Wrigley and Spence patent which was a Titan Co. A/S contribution. We purchased that patent covering the removal of iron sulfate from solutions prior to hydrolysis. In other words, we freed them and they freed us to that extent.

Mr. WEBSTER. That is all.

Recross examination by Mr. Dixon:

Q. So that by both companies using the same processes as you have described the products would be substantially the same, would they not?—A. Yes, I would say that.

Recross examination by Mr. Whitney:

Q. Mr. Kaeghehn, am I right in my understanding that the agreement—I don't mean written but I mean whatever agreement it may be—under which National Lead and Titan got the right to see the du Pont patent applications six months after they are filed is non-exclusive and du

Pont is free to make the same agreement with any third party without objection from National Lead or Titan?—

A. That is correct.

(Witness excused.)

2808 GUSTAV ADOLF JEBSEN, called as a witness on behalf of defendant National Lead Company, being first duly sworn, testified as follows:

Direct examination by Mr. WEBSTER:

Q. Dr. Jebesen, of what country are you a citizen?—A. Norway.

Q. Referring to your last trip to the United States, how long have you been here, that is, since what date?—

A. Well, I arrived from Paris during July, on the 15th, 1940, and since then I have been up in Canada once or twice for short visits.

Q. Dr. Jebesen, what is your profession or occupation?—

A. Chemist I suppose is the nearest.

Q. Where did you receive your education?—A. First in Norway, and the education as a chemist I received in Germany, Switzerland and France.

Q. What degrees did you receive?—A. The Doctor degree at the University of Zurich, Doctor of Philosophy. I also took in Germany an examination after the first two years at the Technical Institute.

Q. In what business was your father engaged?—A. He was in industry, a textile manufacturer, and had several factories for textiles, and then he was a ship owner.

Q. Was that Fredriksstad?—A. No, in Bergen. I was born in Bergen. He was a member of the Norwegian Parliament once or twice.

Q. What have your activities in the United States been since your last arrival here?—A. I have been acting as an advisor in various matters with the National Lead Company, I have an office there, and I took part in the preparation of a magnesium factory here at one time and then I have been acting for the Norwegian Government in various capacities.

Q. Can you describe the capacity in which you have been serving the Norwegian Government?—A. I am chairman of the Advisory Committee on Industry in the Ministry of Supply and Rehabilitation, and also I am sitting on a council for the Purchasing Agency for the same Ministry.

Q. After you had received your technical education what did you next do?—A. I went first, for about a year, into

studying some business, and then I was also assistant in doing some work with a professor in Charlottenburg, Germany, and then in 1909 I went up to Norway, I had been offered a position with the Norwegian nitrogen industry, fairly newly started. However, I declined, but since that with this Titan matter.

Q. Will you just explain to the Court how it was you happened to get interested in the titanium business?—A.

Yes, there was in 1907 or 1908, formed by the Government a Commission for investigating and studying the possibility of getting an iron and steel industry in Norway. One hundred years before there had been a relatively considerable iron industry and they wanted to see if they could not bring it up again. In connection with that investigation there was made a study of Norwegian iron ores and in the course of that they also came to the very large deposit of ilmenite and titaniferous iron ore on the southwest coast of Norway. One of the members was a Dr. Farup, and he was connected with the University also, and he got an idea of making some Red pigment by oxidizing the ilmenite. He had made some heating and calcining of ilmenite for the purpose of seeing if he could facilitate getting the iron out of this and that taught him that the ilmenite oxidized fairly easy. He addressed himself to a Dr. Eyde, who was the head of the Norwegian nitrogen industry, and the creator of that industry in Norway, and probably was the first to produce nitrogen in large industrial measure. It was in about 1905 that started. And Dr. Farup got him interested in the development of the use of the ore, so he asked me if I would take a hand in this and see what could be done.

2811 And so we got together, Dr. Eyde and a friend of his, Dr. Peterson, who was the head of a very large Norwegian carbide factory in Norway and one in Sweden. And it was up to me to develop the thing. And we put in some money, all of us.

Now, after about six months I came to the conclusion that this thing really had no economic future and there wasn't anything to be done with it. So that made me to see what could otherwise be done with this ore and brought me on the thought of looking into the titanium dioxide which was, after all, white, and see if something could be done with that. And as I found out then or rather—yes, found out I would say, that this titanium dioxide had this great hiding power—and when I say "great" it wasn't by far as great as we have it today, but it was considerably

more than the known pigments at that time. So I suggested to Eyde and Peterson that we should rather put our efforts in that direction.

Do you want me to go on?

Q. Yes. I wish you would just explain how you happened to develop the first stages in the titanium pigment.—

A. Of course, the first problem was to get the iron out, and we started—well, before that, I would say we started just a little trial with sulfuric acid and got some titanium dioxide, just confirming again this hiding power, but as a pigment it was not particularly good at that time. I think I applied for the first patent on this in Norway in the spring of 1910, somewhere about that time. It was a very roughly drawn patent at that time.

Then we thought we should rather try to get the iron out first. And we started at a carbide factory with a furnace of about 2000 horsepower taking out the iron and got the titanium in the slag at a kind of calcium titanate. The idea was to treat this with nitric acid in the nitrogen factory I just talked about, make nitrate of lime and the titanium dioxide. However, we did not succeed in getting the slag sufficiently dissolved, so finally we had to drop that.

Q. I would like to have you lead us up as briefly as you can to your own sulfuric acid attack process.—A. Then, these kind of experiments cost too much, and I suggested to Dr. Eyde and Dr. Peterson that we should rather leave the thing in the hands of Farup, who in the meantime had got a Chair at the newly erected institute of technology in Trondhjem. And he carried on for a few years with various processes, one of them very similar to what they had up in Niagara Falls. I did not think that those were economic enough to really go ahead with.

In 1914 I was over here on other matters, business matters. I had gone into a firm called—a Norwegian company for Electro-Chemical Industry. That is a translation of the Norwegian name. I was here in 1914 and met—also called on W. F. Meredith. I did not know him before. I just happened to know that there was a titanium alloy company up at Niagara Falls, and we had titaniferous ore, so I wanted to see if we could sell some to him. I was at that time one of the managing directors of the electro-chemical company which had various interests. And sitting there and talking with Mr. Meredith, he told me about a property he had here which was so and so large and so and so wonderful.

Q. That is, ilmenite properties?—A. Ilmenite properties,

yes. And this reminded me of a letter we had received from a Norwegian-American engineer here who wanted to know if we were willing to sell a patent which had been taken out in Norway and here in the United States. And I asked if Meredith had a Mr. so and so in his service, and he said yes, he was, but not any more; "Why do you ask?" I told him about the letter which also mentioned the American ilmenite property. He said, "It is rather funny." And next day he phoned me and asked if I could see him again and he said, "Look here, will you sell us that patent?" I said, "No, it is not of interest, I don't think you should buy it at all." He said, "I will offer you \$1500 for it and a royalty." I said, "No." He said, "You know more perhaps about titanium than you will tell me." I said, "Maybe." To which Meredith remarked, "I may know no more about titanium than I will tell you." Well, he—

Q. I just want to be sure that that is leading up to your final work on sulfuric acid.—A. Yes. This may be a little long, but I will very soon come to the point.

Anyhow, we were talking a little further and I found out that he was interested—that he was working on the idea of making titanium dioxide. And this naturally made me feel that we would have to go ahead a little bit quicker than we had been. So, I reviewed my experience in titanium in these experiments and so on and remembered certain reactions which had taken place at certain times between ilmenite and sulfuric acid under special circumstances.

That led me, when I came back, to say to Farup, "Now we are going to concentrate, I want to concentrate on making this titanium dioxide using only ore and sulfuric acid. Those are both relatively cheap materials, basic materials, the sulfuric acid, and not try all these other additions which you have been trying."

And I put a man, one young chemist, to do this. I said, "You pulverize the ilmenite and mix it with sulfuric acid and you just make—I would say a kind of paste more or less, and heat it and then we will get this reaction resulting in a cake; and then you will dissolve it in water and see how much you get dissolved."

We got about two-thirds dissolved. And, taking the residue in the same way he got the same again, two-thirds dissolved. So I reasoned that further development might bring up those recoveries considerably.

Then Farup, who had been very much opposed to this, because—he said, "You won't succeed"—I will just put

forth the following: When we dissolved this cake, we had, according to the literature, to dilute the solutions with water in order to get the titanium dioxide precipitated by boiling, hydrolyzation. We found that so much water was necessary that the handling would cost practically as much as the whole pigment might be worth, compared with the prices for other pigments at that time. And Farup said, "Well, there you are, you won't be able to get anywhere."

Then, after a little while I went down to the laboratory and said to this young chemist that he should take a cake of the kind he had made before, with the sulfuric acid, dissolve with water, take the solution and put on another cake and try to make as concentrated a solution as possible, and then boil it.

And after a few days he came back very happy, telling me that when he boiled this solution he suddenly got a white precipitate, and that was the titanium oxide. There
2816 I was had at once, or in the course of a short time, found the solution to this problem,—where Farup had been working years, an economic attack on our ore. And this was a surprise, because the literature did not in any way indicate that we could get a precipitation or hydrolyzation from a concentrated solution. It was a new discovery at that time.

Q. Dr. Jebsen, was that the process that was covered in your famous patent?—A. Yes, that was covered in a patent, that is right. And having got that first step you will see that there were certain patents taken out in the names of various of my collaborators down there at the laboratory which actually followed that development. There was the Fladmark patent and there was I think the Olsen and Forland patent, and so on.

Q. And Goldschmidt?—A. Goldschmidt came considerably later.

Q. Now, when was the Titan Company A/S formed?—A. That was in 1916. These developments came in the Autumn and Summer of 1914, that I told you about. Then we tried to develop it in a pilot plant and so on, and when we thought we had got sufficient experience we formed the Titan Company A/S in the Autumn of 1916.

Q. Who were the owners, the shareholders in the Titan Company A/S?—A. That was this company in
2817 which I was manager, and—

Q. That is the Norwegian Electro-Chemical Company?—A. Yes. They owned the development at that time,

because when I became managing director, when I was asked to become the managing director of that company I made it a condition that this titanium development should be taken over by the company. I did not want to have any such dividend interest at that time, outside and so on. And they got a certain amount of shares, and all the rest was cash. I think I was the next largest shareholder.

Q. May I ask how much you invested in the company?—

A. At that time, if I remember right, about 600,000 kroner of a capital of four million. Yes, 600,000, though altogether I invested over one million kroner.

Q. Will you translate that into dollars?—A. Well, the dollar was at that time worth—the par value was 3.72. At that time, during the war, the value was about 3 kroner. Norwegian currency was considerably above par.

Q. That is, 3 kroner to the dollar?—A. To the dollar at that time.

Q. What other interests did that company have?—A. Which company?

Q. The Titan Company A/S.—A. Well, they took over the patents, and then they bought the shares of a company which owned these mines, these mines on the west coast of Norway.

Q. By the way, is the ilmenite that comes from those Norwegian mines similar to the ilmenite now obtained from the McIntyre development?—A. Fairly similar. It is the closest to that, practically. I think the McIntyre is a little bit harder, I understand, and as crude ore McIntyre ilmenite is mixed in with magnetite, and then when you separate it and get your ilmenite out it is very much—

Q. What progress had the Titan Company A/S made in the development and manufacture of pigment up to, say, 1920?—A. Of course during the war it was very difficult to get machinery, and, therefore, we did not go ahead with the manufacturing operations before the late summer of 1919. Up to that time we had been just erecting and building the factory. And we started with a pigment which contained about 87 per cent of titanium dioxide. After we had precipitated, we put in some barium carbonate to neutralize the sulfuric acid, which was found in the precipitate or out of the sulfate, you might say, titanium sulfate. And that pigment we put on the market first in Norway and later we put it on the market in England to a very small extent. In Norway we made quite

a hit the first year. Of course, we put in a lot of money on propaganda. And the pigment was a very good pigment in many respects, but the color was not quite as white as it ought to be, and as we would like to have had it and as it is today. It was used chiefly for outside use. The difficulty that we encountered was that it was very expensive, and naturally we had difficulty in getting the high price which we had to ask in order to cover our expenses. In fact, we didn't cover amortization at that time and, to begin with, we were running with losses.

Q. If I may ask a question there, what was the situation competitively at that time with reference to other white pigments?—A. Well, I don't remember the prices now exactly.

Q. I don't care about that.—A. But I may just perhaps illustrate the situation if I can tell you a little story which happened in 1920 after I had my association with McCarty, over here with the National Lead Company. He received a letter from an English white lead manufacturer who was the head of the White Lead Manufacturers Association there, who wrote to him "as regards this new pigment which the Norwegians are putting out here, there is nothing to be feared because there won't be money enough in the world to pay the price for it; there isn't raw material enough to produce any quantities." That was his opinion at that time.

2820 I believe when we came to selling in England, I believe we asked like a hundred pounds a ton, but really I don't remember that exactly.

Q. That is your best recollection?—A. Yes. Or something more, even.

Q. After your trip to the United States in 1914, when did you next come to the United States?—A. In 1920. I received—

Q. If I may ask a question to guide the testimony a little, what was the occasion for that trip to the United States and how did you happen to come, and what happened after you got here? I wish you would just abbreviate it as much as you can, without unduly— A. I had two purposes for coming to the United States. One was a letter from McCarty of National Lead Company, who wrote that they were interested in a titanium development over here—that referred to this Barton process—and would like to know if we would join forces, exchange experience and patents and so on. The other was a different business, an

entirely different matter. I was at that time chairman of the Titan Company A/S, not manager, and I was still managing director of this other company. So I came over for these two purposes.

Q. Tell us about what happened after you got here.

What did you and Mr. McCarty do?—A. Well, when 2821 we met the first thing of course was to make our acquaintance. And then McCarty told me about the interest that National Lead Company had taken in the titanium pigment preparation—they had taken ten per cent at that time and had an option on 40 per cent of the shares, but they wanted to know whether there was a possibility of getting cooperation in this matter. It was evident that they didn't like the idea of patent litigation, if that should come up. And particularly, Mr. Cornish, the president of National Lead Company, brought out, I think it was the Bell Telephone, or some of these other developments over here, the advantages brought out of getting together instead of fighting, and he pointed out that as far as inventions were concerned, as this had been done entirely independently on both sides, that there should be no professional jealousy of any kind. I was perfectly aware that a cooperation would be a good thing.

Q. I did not get that.—A. That the cooperation would be an advantageous thing to do. With regard to the position of the American company and their developments, we knew about this composite pigment development which they had made. We also had an idea about what processes they were using, which we didn't think much of, we did not think they were of any value, they didn't interest us; but this composite pigment was what was 2822 interesting.

At the same time, it was perfectly clear that we were only in the beginning, in spite of all the years we had spent on this, we were only in the beginning of a new industry here opening up. And it seemed to me as one will—in one respect we thought it may lead to not only titanium pigments but many other titanium products; once we have got one product cheaply produced on a large scale it naturally is likely to open up possibilities in other directions. Before that time titanium dioxide was really what you might call a fancy article, just a laboratory product produced by a few firms who made products for use in laboratories. I mean just for demonstration or experiments of some kind.

Talking it over with McCarty, we seemed to have very

much the same view, and with Mr. Meredith, who took part in this, that in order to get forward the best thing will be to get as open cooperation as possible, exchanging licenses, exchanging views, opening up our factories for each other, and so on. And once we had agreed upon that we just put our heads together to find out how we can best reach this goal.

Q. You and Mr. McCarty worked together?—A. Yes.

Q. In doing that?—A. In developing this.

2823 Q. After you had decided that you would work together with a view to the development, did you then undertake to put down your ideas on paper?—A. Yes. But first there was a little incident of one meeting when Meredith particularly began to talk about their patents, what position they had, and I said to him, "I don't think we should begin to talk about that at all because it would only lead to you talking about what wonderful things you have and I talking about the wonderful things I have; and at the same time there are a certain amount of patent applications, which are not known and which we will not disclose to you now and you probably are in a similar position so I suggest that we leave that entirely out and agree on just one principle; that what you have and what we have is of equal value."

And then we built up, tried to get together on an agreement on that basis, to make it as equitable as possible for both parties, "you working here and we working on the other side."

Q. Now did you stay over here until that agreement had been fully drafted?—A. Yes. I signed it too, over here.

Q. I want to ask you the question, did you and Mr. McCarty together work out the provisions of the 1920 agreement, is that correct?—A. Yes. After we had got so far, Mr. Webster, after a few points, the rest of it
2824 was really not what one may call negotiations. It was a common goal we were looking for at that time.

Q. And you found that Mr. McCarty and you were in agreement in working it out that way?—A. Yes.

Q. Now I want to ask you some questions about the 1920 agreement, and because I think you are more familiar with handling the printed working form used in the office I am going to give you a copy of that (handing).

The COURT. That is a duplicate of Exhibit A?

Mr. WEBSTER. Yes, your Honor, Exhibit A. It is the form from which Exhibit A was copied.

Q. (Continuing) Were Mr. McCarty and Mr. Meredith fully aware of the work that you had been doing in Norway, the patent work that had been done there?—A. I do not know. We did not discuss it. I mean after what I told you we did not discuss it any more.

Q. I want to ask you some questions if you will just take that form of agreement; do you note the definition of "Licensed Field" there, Dr. Jebsen?—A. Yes.

Q. Did you have discussions with Mr. McCarty about that?—A. Oh, yes.

Q. What was the objective that you attempted to reach or embrace in that particular definition? In other words, what was the purpose of placing that definition in the 1920 agreement?—A. The idea was that we
2825 should cooperate on practically every subject matter, which was necessary for the development of this industry. What directly had to do with the development of the titanium industry as it may come along with the exception of the alloys.

Q. Is there any reason for taking in such a wide field?—A. Yes. We thought that if the one party gave the other party access to their knowledge it means to put into the other party facilities for finding new developments, new things, and we did not consider it fair to do that without both parties having the right to those developments.

Q. Was there any special reason for using the expression "apparatus, methods and processes"?—A. Certainly. I mean after all the industry consists of apparatus, methods and processes. "Methods and processes" I suppose covers practically the same thing, and I don't know why we used both those words.

The COURT. Lawyers charge by the word.

Q. It was your purpose also, was it not, to make the definition clear and comprehensive; is that correct?—A. Yes, and as I said before it should really include practically everything which had to do with the production of any titanium products.

Q. Outside of the field of metallic—A. Except the
2826 metallic field.

Q. Now I note at the foot of that page the definition of "finished articles." Did you have something to do with the drafting of that provision, at the foot of page one?—A. You mean the definition?

Q. Yes.—A. Well, I don't remember now. I suppose that was a common effort to define it.

Q. It was your intention that this agreement should relate in part, as it does later on, to the subject of finished articles, is that true?—A. That was natural, yes.

Q. Why do you say that was natural?—A. Because when you handle and deal with an industry and you get a new product like titanium pigment, the first thing you would do would be to examine the possibilities of its use and by doing so having that material in your hands before anybody else, naturally you have got an advantage in finding out what it can be used for, and that opens up again the possibility of taking out patents and that means if you have secured patents you can stymie the other party in its development.

Q. And it was your purpose to avoid being stopped or stymied by someone else's development if you could avoid it?—A. That is right. That is the main part of it.

Q. Now turning to the next page, page 2, Article 2827 II of the agreement, you note that the Pigment Company, that is the American company, "agrees to grant to the Titan Company, and the Titan Company accepts therefrom, a license exclusive of all others, including said Pigment Company."

Was there any reason for making the license exclusive of all others including the Titanium Pigment Company?—

A. Our reasoning at that time was, and naturally so—I again use that expression—that you cannot get a good cooperation between two companies or two men if the information passed from one to the other can be used in competition against the other. We wanted open, free cooperation and if you give another man, as I say, a tool to fight you, unless you do not get your part for yourself—

Q. That is, you assure yourself?—A. A natural exclusivity outside of others. Well, that is evident. I don't think it is necessary to explain.

Q. You have said that you believed that you should give the other person opportunity to operate with your licenses. Why must you give the other party under an arrangement of this sort an exclusive license? What is the reason for that?—A. You mean not exclusive of one's self, but exclusive of others?

Q. Yes.—A. After all, what are patents for? 2828. When you make inventions and you want to develop a new thing you have to have a patent because a certain protection is necessary, not only as compensation for the invention but it is doubly necessary because you need it as a protection—giving you a kind of time for

developing what is necessary in order to produce at a cheap price and get it into the market.

Q. I notice you use the words "develop a new product." Do you place emphasis on the fact that this arrangement related to a new product?—A. Yes.

Q. Was that a factor in your consideration?—A. Oh, yes.

Q. Will you explain that to the Court, please?—A. Well, a new product—first of all, here was a new process and a new product. It was an entirely new field, and this applies not only to the products but this applies to the processes too. A process of this kind is naturally subject to considerable development and you want and need to have your time quiet for study and development and spending the money necessary for eliminating what may be called the weaknesses of the process, or improving the process. And when you are coming to the question of a new product. Of course it depends upon what kind, but practically most new products, I suppose anyhow a thing of this kind,

2829 takes its time before you can get it introduced and consumed. It can be a matter of more or less time where you have to do with pigments, but it is a very, very long time you need for developing the market for things of this kind, and that for many reasons: first you have to get to know the qualities and properties of your products, and they certainly can give you many surprises, and we have had many surprises with the pigments; and, second, you have to educate your customers and get their confidence in this product, and teach them to use it, and in teaching them you teach yourself as to what experience and qualities it includes. It is not only a matter of tinting strength and higher opacity and so on, but many other questions are coming in there. You take now at the National Lead Company; they have a large laboratory and a very large staff, which has been working for years and years and years studying only the use of the pigments and their qualities. So naturally a company spending money on that would like to be secured a certain exclusivity to get their money back and get a profit out of it.

Q. I asked you about Article II before, and I should have asked you about the definition of territories. A consideration of territories was one of the basic considerations in your discussions with Mr. McCarty was it not?—

A. Yes.

2830 Q. And you did first define the territory that you

were talking about, is that true?—A. Yes.

Q. And when you granted an exclusive license to the Titan Company you meant an exclusive license to the Titan Company to operate outside the territory that was granted to the Titanium Pigment Company, is that correct?—A. Yes.

Q. And I gather from what you have now said that the one purpose of making these licenses exclusive was to secure the full cooperation of the licensee and to secure his investment in the territory which was assigned to him? Is that correct?—A. That is so, yes. In other words, in order not to interfere with this other's business to get that full cooperation, full confidence we had to divide up in these territories.

The COURT. You felt you could not get full cooperation of a genuine character unless you abided competition; isn't that the plain fact?

The WITNESS. That is the truth.

Q. I would like to have you explain your reasons for answering his Honor's question as you did.—A. I do not quite understand.

Q. Why was it true that cooperation of the sort that you intended was dependent upon having exclusive territories assigned in this agreement?

2831 The COURT. You did not think it was humer to give your competitor all the information you had if he was going to steal your business from you?

The WITNESS. Yes, sir, and not only that—

The COURT. I did not mean "steal" in any way excepting taking your customers away.

The WITNESS. Yes, taking the customers away, and, for instance, also you have certain countries in which you have protective tariffs and in other countries there are none, and so on. Here in the United States as far as I remember there was a tariff on the other white pigments. I could not say for certain about the titanium but only a few years later when titanium really begins to appear on the market a tariff was imposed on that. Now I mean from a European point of view naturally you did not want to have—England was at that time open, and you do not like to have somebody sitting behind the tariff and shooting at you.

Q. You used the expression, "every invention, improvement or subject matter." Was that likewise intended to secure the licensee in the manner you have described instead of merely restricting it to present inventions?—A.

Yes. That applies to the future inventions.

2832 Q. And the same is true of the expression, "Now or hereafter owned or controlled by the Pigment Company"?—A. Yes.

Q. Now with reference to those territories, the territory assigned to the Pigment Company was the territory defined in the agreement, and the territory assigned to the Titan Company was the territory outside North America, was it not? Now what was the reason for making a separate provision with reference to South America?—A. Simply we both wanted it and made a compromise. That is all there was to it.

Q. Directing your attention to Article V on page 3, that provision as written in 1920 was amended in 1928, was it not?—A. Yes, I think so. There were some amendments afterwards about that.

Q. Did those amendments affect the substance of this agreement or were they simply mechanical?—A. They were mechanical.

Q. And indeed all of Article V was intended to simply implement the cooperation between the parties, is that correct?—A. Yes.

Q. And adds nothing of substance—A. And at the same time make it as flexible as possible. You will note with regard to exchange of patents, and so on, if somebody wanted not to have the expense of patents they did
2833 not need it if they did not think it of interest enough. We tried to make these obligations as flexible as possible, and if somebody had a patent and wanted to drop it and was not interested in exclusivity but wanted a nonexclusive.

Q. Your object was to make this whole operation work as smoothly and easily as possible?—A. Exactly so.

Q. I direct your attention to Article VI on page 4 wherein you agree that you will not directly or indirectly question or test the validity of any patent of the other party. That too was simply to share the cooperation that you have hitherto referred to?—A. Yes. I think that is a very generally acknowledged clause in all that kind of agreements. After all if you are licensed under a patent you should not contest the validity.

The COURT. There is no point in your spending money to fight a National Lead patent if you are going to get an exclusive license under it in your territory?

The WITNESS. Exactly, yes, sir.

The COURT. On the contrary, it is to your advantage to get as many patents as possible?

The WITNESS. That is right.

Q. I direct your attention to the royalty provisions toward the end of page 4. What was the purpose of including those royalty provisions?—A. It was a 2834 manner of trying to equalize the values. The basis was equal value for what was contributed by both parties, and as the market was a different one in character and size the idea was that the one who gets ahead and has got the best market, may be more receptive for the pigment and the largest market, he should pay a cash compensation to the other. On the other hand, it was also arranged, you will note, that the one cannot get more than double of what his own production is and that was done for the purpose that none of us should simply sit down and do nothing and just live on these royalties from the other party. So if one were inactive one would not get anything out of it.

Q. Now on page 5(c)1 it reads:

"The Titan Company shall, and hereby does constitute and appoint, and shall hereafter continuously retain, to the exclusion of all others, the Pigment Company as its sole agent, so long as said Pigment Company has an exclusive license hereunder, for introduction and sale in 'North America' of all products of the Titan Company in the 'Licensed Field', upon such orders of said agent therefor at current European market prices of the Titan Company as the latter shall elect to fill."

Q. What was the purpose of putting that agency provision in this agreement?—A. Well, you may call 2835 it to some extent fat on butter. I don't know whether that expression is right. On the one side it should be a close cooperation, and although the patents were there giving full protection we thought a clause of this kind might help us not to have patent litigation if something should happen.

Q. On page 6 there is reference to an exception in the case of certain finished articles. Did you consider finished articles should be treated differently from pigments?—A. Naturally. It was to be foreseen that there could be a flow of finished articles between these various countries. That was also quite to some extent in our interest to have it, because it would help to develop the industry as it would help to develop the markets. If a product containing titanium came from here over to the European market

and there was a demand for it there would be a request for Titanium Pigments on the other side. At the same time we did not want to have what you might call camouflaged exports of pigments. In other words, we said here that it should substantially contain—if I remember rightly—it should constitute such an important part of such finished article that its sale within the agent's territory will substantially interfere with said agent's sales. Now if you take a paste of titanium containing 10 or 15 per cent of oil it might be called by somebody a finished article.

2836 In other words, it may be just a camouflaged export.

You see what I mean?

Q. Yes.—A. And at the same time having the patents, as you will have noticed there should be a time, if the other party wanted to interfere with such impartation on the basis of the patents, there is a certain time for arrangement of that part of it.

The COURT. An adjustment period?

The WITNESS. Yes.

The COURT. To avoid conflict?

The WITNESS. And to avoid embarrassing of customers too.

Q. You and Mr. McCarty were just anticipating what the case might be in finished articles?—A. Yes. In fact, it has never been of interest or never been used.

Q. Has this restriction provision with reference to finished articles ever been of any importance at all?—A. None whatever. And as you will notice on the European agreements it is left out there, between the European companies, and it could have been left out here a long time ago. I mean at the same time if I only had the energy of getting it eliminated, because it has never been in effect.

Q. And was put in simply because you wanted to try to cover everything at that time?—A. Yes.

Q. Now I do not think I need ask you about the

2837 provisions for exchange of technical information.

That was of the essence was it not?—A. Of course the most important thing is naturally the patent matter itself, because by patents you could prevent legal—you could stymie the other party so it was necessary to have these licenses, and then comes the exchange of information.

Q. I do not want to ask you about the terms of this provision for exchange of technical information but I do want to ask you to explain separately the reason why, in your own words, the exchange of technical information is considered by you as of the essence of an arrangement of this character.—A. It certainly is most important.

Q. Now just tell us why in your own language.—A. Because every invention, every development, is based on previous experience, patented or unpatented, and the more you can get exchange of the experience the more provision is provided for a further development. Also talk about it; discussing; getting together in the province of the chemist, and so on, that very often develops ideas. We went so far in Europe in these matters in spite of what you may call professional jealousy, which may sometimes occur, and sometimes is a very difficult matter to eliminate, that when the chemists came together they discussed very openly and freely. For instance I remember at one meeting in

Paris in 1935 or 1936, I think it was, the Germans

2838 came with a bottle of titanium pigment and said,

“Look at this. This has a tinting strength,” I

think, “of 2000.” I am not quite certain. We were making

a pigment at that time with a tinting strength of about 1200, “and this is the goal we should be aiming at.” Now

that was made in the laboratory, specially prepared, and it took a considerable interest. We knew we could get

higher tinting strength, but it means something to get something of that kind presented or demonstrated and the

Germans continued with that and I think the year after they had got quite a little way ahead of it but the color

was not quite as good as it ought to be—and it led to the Rutio development in which the English also took an

interest in and started research work.

Q. If you were to compare the value, from the standard, you have described, of exchange of licenses on the one side

and exchange of technical information on the other, to which would you attach the greatest weight or value?—A.

I do not quite get that.

Q. If you were to attempt to assign a value to the exchange of licenses, of exclusive licenses, on the one side,

and exchange of technical information on the other, from a standpoint of the development of the industry, to which

would you yourself assign the greatest importance?—A. It is impossible to make a comparison. For one thing the

exchange of know-how and experience is a technical

2839 development. Exchange of licenses under patents is a legal matter. They are in their character very

different.

Q. Doctor, directing your attention now to Article XIV, you know without my going through that what Article XIV provides, in substance, do you not?—A. Yes.

Q. What was the purpose of Article XIV?—A. Well,

I mean in short you see there is no reason. I mean an agreement like this would not have much sense unless it is certain that none of the parties can go and give sub-licenses without those sub-licenses adhering to the same conditions as the main agreement, and the sub-licensing had to be taken into account and foreseen, naturally, particularly in Europe. After all there we have several countries with and without tariffs, and you could not expect satisfactorily to develop the industry and the sales in those markets without having factories in those markets and that means again companies in those markets to be licensed or sub-licensed.

(Short recess.)

Q. Now, Doctor, having obtained this 1920 agreement and having executed it, what happened to the Norwegian company? What did it do? What activity did it engage in?—A. Well, we were struggling on. We were trying to introduce the pigment and continue the work from 1919. After all the effect of this agreement was we immediately started to produce a composite pigment into the Norwegian factory which was not a very difficult thing to do. I mean you used our process with the solutions as they were. That enabled us to put on the market the pigment at a cheaper price, much cheaper price. The original one was rather difficult to get the people to buy because the price per tonnage was so high and they were unused to that kind of prices. And then we worked on for years up to 1927 and we started in other countries and in England and in France.

Q. Was there considerable promotional work done in Europe between 1920 and 1927, say?—A. Oh, yes.

Q. How successful was the Norwegian company? That is, financially?—A. Well, not very much. I cannot say that, I am sorry to say.

Q. Just tell us what happened to that company.—A. We started with 4,000,000 kroner and then we extended to 6,000,000 and then we extended to 9,000,000 kroner. A kroner was worth about 24 cents, or 22 cents it was. At that time the par value was 3 kroner and 72 per dollar and the real value, exchange value in those years of the twenties varied very much. This was after the war period where the Norwegian exchange—they practically played football with it on this side in Wall Street. It varied. I remember in 1917 a dollar was down to 2 kroner and 72, and when the war finished it increased rapidly and the dollar came up to 3 kroner and 72 or 3 and 74 which

2841 is the par value. In 1920 when I was over here I had to pay 8 kroner per dollar, and then it went down to 5 kroner and then it went up again to 6 or 7 and went down again and it was just up and down in those years.

Q. Did the company have to borrow money?—A. Yes. We had to borrow money in a bank and finally then as we developed a market, first of all in England and in the Scandinavian countries and Holland and Belgium, and France too but not with much success, and in Germany I think we started in about 1924 or 1925, but it was very difficult to develop the market in Germany because licenses were necessary for the importation of the product.

You asked about the financial point of view. After we had spent this 9,000,000 I think the bank had given us somewhat nearly up to the same amount but not quite, and we did not pay interest for several years, so finally we wrote off the share capital from 9,000,000 down to 900,000 kroner and converted part of the loan up to, I think it was, 6,100,000. It was made—

Q. I was going to move on to another subject. Did you finish?—A. So then we ended up with a capital of 7,000,000 kroner and still had some loan.

Q. The time came in 1927 when a large percentage of the company was purchased by the National Lead Company, did it not?—A. Yes.

2842 Q. Before I get to that I want to ask you one or two questions about operations in France. There is correspondence here relating to your conversations with a man named Lobstein. Can you tell us briefly who Mr. Lobstein was and how you happened to be negotiating with him in those matters?—A. I believe that was in 1922, somewhere about that time, that Lobstein, who was the president of a company called Societe Minière et Industrielle Franco-Brésilienne. They wrote us and asked if we would give them a license for France. And once I was down in Paris I had a talk with Mr. Lobstein about this. They had some monazite deposits in Brazil from which they made the rare earth metal products. It is a similar enterprise to the one of Societe Terres Rares, Blumenfeld's company. They were competitors, those two, and also the Auer Company in Germany was a competitor. And they were asking if we would give them a license. France had a tariff duty on titanium so we were interested in seeing something done. So we gave them an option, if

I remember right, an option for two or three years, I believe, on a license agreement built on the same principles as these here with the idea of forming a company. However, it proved that they were not sufficiently influential to really take on a thing of this kind and they finally introduced the matter to a man called Andre Vincent, who was the managing director, or president you would call it here, of Comptoir Lyon-Alemand, which I was told was a hundred years old French company dealing in gold and silver, very well financed. This man also was the president of the company called Societe Minerais et Metaux, which was formed on the initiative of the French Government during the last war. During the last war they found out in England and France—and Italy, I think it was—that the metal business in Europe was practically controlled and in the hands of the Metallgesellschaft. They had made long years' agreements with the metal mines and sent their ore to various factories they had in Belgium and Holland and various places so that the whole thing was a mess when the war broke out, and then there was formed on the initiative of the English Government in England the British Metal Corporation, and in France the company I just mentioned, and shareholders were the most important metal producers in those countries. In France you had for instance "Societe Royale Asturienne"—this is really a Belgium company but with French capital and having their mines in Spain by the way—and I believe the Societe Produits Chimique d'Alais, Troges et Camargue.

Q. I don't want to curtail this, but to get back to Lobstein and his connection with your French company—
A. He introduced this man who was interested and they formed the Societe Industrielle du Titane, and Vincent and his group should be the carrying forces behind it.

Q. And then ultimately the National Lead or the Titan Company bought most of the stock?—A. Yes. This French company, or those people, sent experts up to Norway and found, as far as the process and product were concerned, they were very good, but in spite of that Mr. Vincent told me they were not interested to continue because they thought it would take too much time to develop the market. And that was in the time of 1926 and I was just then on my way going over here, so I told him I did not want to deal with it at that time and asked him to wait until the spring, until I got back, and then McCarty and the

National Lead Company had taken over the majority of the shares of Titan Co. A/S and they thought it would be better to buy the French out instead of having the French company dissolved.

Q. There was never any manufacture by the French SIT?—A. No. The French company was intended to manufacture but it never came so far.

Q. But there was manufacture, was there not, by Blumenfeld?—A. Yes. He had a small factory connected with Thann & Mulhouse. I think it was owned by Thann & Mulhouse.

Q. Coming down to the acquisition of the Titan A/S stock and the stock of SIT, can you tell us what percentage of the shares of Titan A/S were acquired by the Lead Company?—A. 87 per cent, approximately; not quite.

Q. And the percentage of stock in the French company?—A. That stock was bought partly by National Lead or by Titan Co., Inc. and partly by Titan Co. A/S and represented together about 78 per cent.

Q. And did you yourself retain an interest in the Titan Co. A/S?—A. Yes. The National Lead Company made it a condition that I should retain my interest, which was about 13 per cent.

Q. Were there other persons interested in acquiring the stock of that company?—A. Of the Lead Company?

Q. No. Of Titan Co. A/S.—A. Of the Titan Co. A/S, yes.

2845 Q. What other company?—A. The German company was interested. I. G. Farbenindustrie.

Q. Just tell us what the facts were with reference to that.—A. In about 1925, I think it was, I was approached by the IG people indirectly and later directly, asking if they could get some license in this matter and see if some kind of arrangement could be worked out. I negotiated with them for Germany and certain other countries in central Europe. And during those negotiations I was informed that they approached—behind my back they approached, through somebody up in Oslo, they approached the bank with the idea of buying up, you see. And when I heard of that I said, if there was going to be any sale, if the bank wanted to sell out, which they had not said before, the National Lead Company should have the first chance. After all, the cooperation had been a very good one, and particularly McCarty, whom I had met every year, and I had become very good friends and so on. So I wrote to

him and told him the story as it was, that there was an opportunity for them to acquire the shares. Then they wrote back and invited me to come over, but they said immediately, beforehand, that the condition was that I should undertake the management and retain my interest.

Q. That was all done and the National Lead Company acquired the stock with the permission of the Norwegian Government, is that correct?—A. Yes. They got the concession afterwards from the Government.

Q. What effect did this acquisition of the shares have on the operation of the Norwegian company?—A. Well, of course, the situation with the Norwegian company was that it looked very doubtful that that company could continue operating a factory in Norway. And during the negotiations I had with the Germans it became clear to me that the conditions for manufacture in Germany were so far better, that the best basis would be to manufacture in Germany from a pure manufacturing point of view as to cost and so on.

And during those negotiations regarding the license they offered as compensation for the license, to sell to us at cost price. Of course, the idea was to show us how cheap it was and to get us to stop up in Norway. The acid alone, the price for sulfuric acid that they offered was practically half of the price, of the price for it in Norway at that time. And that wasn't very far from what the prices were in England, too. So, German conditions at that time were far superior to anywhere else in Europe. Now, I was afraid, also another thing I did not like of the idea of it

going to Germany—on the basis of the Norwegian

2847 factory—something very much different of course would be to have the backing of the National Lead

Company at that time as the thing had developed; so when National Lead Company had taken over the Norwegian—

the majority of the shares there, we continued negotiations with the Germans on the basis of being interested with

50 per cent in the German company. And when, finally, the German company had a factory operating and we had got

some definite—I wouldn't say final proof of the cost, but, anyhow, some definite view of what the cost would be and the quality there, the result was that there was nothing else to do than to close the Norwegian factory, in spite of the fact that the plant was there and amortization had to be met.

Q. What was the manufacturing situation in Germany; that is, was there any amount or any substantial amount

of titanium pigment being sold in Germany produced by companies other than the Norwegian Company—A. No.

Q. —after 1920?—A. There was a company which was trying to develop it, but apart from selling a little here and there they did not really develop a market; they had put a lot of money in the thing. In 1924 or 1925, I think it was, we had some discussion on a patent we had been applying for in Germany, the Auer Company made some opposition and we had some chemists sent to Berlin 2848 to appear before the Patent Office there and was also there and met Dr. D'Ans, who was the driving force of the titanium matter in the Auer Company. He suggested that we should join forces, but I did not think it interesting enough.

Q. Did you have any opinion as to the patents of the Auer Company?—A. Not personally: I had not studied them personally, but our chemists had gone into what they knew and didn't consider them of interest.

Q. By that time had the IG been organized?—A. I do not remember exactly; I think it must have been about 1925 or something like that. You see, they were in two stages. The five big German dye industries, dye companies, started by buying up, with each other, shares, so that for instance, take the—

Q. That was the Interessengemeinschaft?—A. Which finally came into a merger of the whole thing. They were trying to get the controlling interest in each other, and the idea of that was to prevent foreign capital from buying them up; they were fearing that that would be done.

Q. Did you have any opinion as to the prospects of the IG in the field of chemicals?—A. I don't quite see what you mean by that. After all, when you get the most important firms in the chemical industry in Germany combining together, with the very great prominence that that industry had all the time before the war and so on, 2849 the prospect is just a matter of developing the market for people like that.

Q. Did you think the research facilities of the IG would be valuable to the Titan Company?—A. Oh, yes, when the time came.

Q. Did you give consideration to the sales facilities that IG had available?—A. Yes. Of course, IG had a lot to offer us. First of all, the cheap commodities, which they were willing to give us at cost plus 10 per cent, and which a company that started on a small scale would have otherwise to buy at the prices for small quantities, which are

very high. The price differences for large and smaller quantities are very high there. First that. Second, their research facilities, their technical engineering knowledge and influence in the country itself. After all, they had the position and their very large organization, with the position which they had not only in Germany, but particularly also in the Balkans and the South and the East, and the Southeast part there; and Japan, and so on.

Q. Had you given any consideration to the possibility of your starting an independent factory to manufacture in Germany in competition with the IG?—A. No. Frankly I would consider that out of place. It couldn't be done as the situation was. It would have been far too risky 2850 to start a factory there alone.

Q. Now you mentioned the opportunity that the IG arrangement gave you to have cheap sulfuric acid and to buy sulfuric acid. Was the IG arrangement attractive from the standpoint of your Norwegian ore?—A. Yes. I mean, so far as they were looking to the Norwegian ore as the natural source of raw material, and which they have been taking since then all the time, I mean before the war, and probably now, too.

The COURT. "Taking" is a good word.

The WITNESS. Yes. They paid a good price before the war.

Q. Did the feature of having local management appeal to you as one of the factors in the IG arrangement?—A. Yes. After all, local management is very important in a country like Germany and in most of the European countries. They are people who are speaking with first-hand information about conditions in those countries. And, naturally, our aim was to get these companies managed as far as possible, to have the management standing on their own feet, because if a crisis came—I don't mean the war, but an economic crisis of some kind, it is impossible, practically impossible, to direct that from one central place.

Q. Now, there is in evidence here, and some 2851 reference has been made to, the provision of the

IG agreement which gave the Titan Company a call on the finished pigments of the IG. Was that an advantage?—A. That was of course the thing which they offered us as the greatest temptation, with cheap prices, which they considered, and we had to develop the market further in the other countries, and getting a cheap source it helped considerably.

Q. What use did you actually make of that opportunity?
—A. To the extent we could sell.

Q. Now, specifically, what use was made of that in England?—A. Well, from 1929, the Spring of 1929, when we closed the Norwegian factory, we took the material chiefly from Germany. It was so much cheaper. We couldn't get it from here at the same price at all. And we took it from Germany, selling into the various countries, and the plan was when these countries—the market is sufficiently developed we would put up a factory in those most important countries, like England, and also France. We have never given up the idea of putting up a factory in France, too. When I say "we have never", I mean up to the war.

Q. Now, the Titan Company, Inc. was organized in 1929. What was the purpose of that, Dr. Jebsen?—A.

Well, that was done according to the wish of the 2852 National Lead Company. And I remember in 1927, when McCarty came over, when I negotiated this agreement with the IG, we also saw Mr. Warburg in Hamburg, the noted banker there, and he advised McCarty very strongly to form a company either in Holland, Switzerland or the United States for taking over this non-Norwegian business in Europe.

Q. What was the reason for that?—A. Oh, partly taxes—chiefly taxes, I would say. But I suppose when National Lead Company wanted it they wanted to have it over here under their own hands to some extent.

Q. Now, after the Titan Company, Inc. was formed you became an officer of that company?—A. Yes.

Q. You had the office of the company in Paris, did you not?—A. Yes.

Q. That was the chief office of the company for some time?—A. Well, the office was really over here, and I was sitting in Paris, going around to all these various companies, overlooking—well, looking after I think is the word.

Q. And reporting to Mr. McCarty?—A. Reporting, yes, and sitting in on the various boards and giving advice and so on. And then Titan Company, Inc. had—I mean, whatever Titan Company, Inc. sold in Europe they used Titan Company A/S in Fredrikstad, Norway. I mean, after—in France, of course, it was the French company, but in Belgium and Holland and in the Scandinavian countries it was the Norwegian company that contracted it. Rather, in Belgium the Nor-

wegian company had a subsidiary in Belgium.

Q. You remember that the stock of the Titan Company A/S and its patent rights and the stock in the Titan Gesellschaft and Societe Industrielle were transferred to Titan Company, Inc. What was the purpose of that?—A. Well, the idea was to have all that which did not concern Norway in the Titan Company, Inc.'s hands. In other words, what Titan Company A/S had before was taken away and put into Titan Company, Incorporated, with the exception naturally of the mines and certain patents which they were still holding; but that didn't matter very much because after all they were the same shareholders in both companies.

Q. The Titan Company, Inc. became the company concerned in the ownership and operation of these European interests?—A. Yes.

Q. And the Titan Company, Inc. assumed the obligations of the Titan Company A/S under the 1920 agreement, is that correct?—A. Yes, with one exception and that was the delivery of the ores. Rather, with two exceptions I would say. The delivery of the ores naturally remained with Titan Company A/S and the Germans made the condition that Titan Company A/S should continue to be under obligation; in other words, stand responsible for Titan Company, Inc.'s acts.

Q. These contracts that were assumed by Titan Company, Inc., of the contracts taken over by that company, the German and French, and other arrangements having to do with countries at war with the United States, have those terminated?—A. As far as I understand, they have. I have not had any contact with the Germans since the—

Mr. Dixon. I object to the answer and move that it be stricken out as a conclusion.

The COURT. All right. He says he does not know anyway.

Mr. Dixon. I am sorry—

The COURT. All right.

Q. Have these companies in Germany and France, and also Japan, had any relations with the Titan Company, Inc. or with you?—A. Pardon me?

Q. Have the companies in Germany or France or Japan had any correspondence with you since the declaration of war?—A. Not since the United States declaration of war. But before, why, naturally I got some—there was some correspondence from Norway over here, certain information. You can find that. Then the United States came

into the war. They were trying to keep us informed to the extent that it was feasible.

2855 Q. Do you recall the arrangement that was made by the IG in 1933 with a company called Sachtleben?—A. Was that in 1933?

Q. What you call an arrangement.—A. Not very much of it. Except that there was—Dr. Kuhne, who was a friend of the head of Sachtleben, whose name I think is Schultz, they made an arrangement. I understand there was some kind of jealousy from Sachtleben not having obtained any arrangement with us—by the way, they were about the same time as the IG wanted to make arrangements; they also approached us in Titan Company A/S and they complained of having suffered somewhat in not being in and were rather furious with us with the idea of having gone into titanium and threatened to go into it. So, one day Kuhne told me that he had given up to the Sachtleben people some of their lithopone business—I think that is it—and he wanted some compensation from Titangesellschaft. I was somewhat surprised when that came up. But I understood that Kuhne had engaged himself and we had either to let him down or agree as to some arrangement there, as was finally done.

2856 Q. As I understand it, you yourself had nothing whatever to do with that arrangement?—A. No.

Q. Now, Dr. Jebesen, what was the situation as regards the sale of titanium pigments in England before 1933; what was the market for it and what were the prospects of that business there?—A. Well, we had been plowing the ground, to use an expression used by our own people in England, and it developed very slowly. The English manufacturers are very conservative and they wanted a lot of experience before they engaged in this to a large extent, and they had to develop the market for their products. And I think in 1931, 1932, or somewhere about that, we were approaching the sale—I don't remember the figures but they are in my report on it—I believe they were about a thousand or twelve hundred tons of TiO_2 , corresponding to that. Anyhow, we began to approach what we thought was the minimum necessary for putting up a factory in England. And then in 1933 we made arrangements with these English companies for putting up a factory. The same considerations were there as in the other: that we wanted to obtain local management in order to create the best basis for the development of the business. We started really somewhat early, based on the tonnage we had, but it was in the hope

2857 that with the domestic factory we would develop so much quicker, which also proved to be the case. We were just at that time considering—we thought if we were on the point of where the sales curve would be, it would go more upwards than before, which also afterwards proved to be the case.

Q. Did you give any consideration at all to setting up an independent American company with a factory in England?—A. No. I mean that was not—we were so bent on the thought that we must have domestic cooperation. In other words, I mean the other thing was considered not to be a good policy at all as the situation was.

Q. Did you give any consideration to the companies in England with which you would have liked to carry out this form of cooperation?—A. Yes. You mean myself or the National Lead company?

Q. Yes, you yourself.—A. Yes. Personally I was most interested to get in the ICI, Imperial Chemical Industry, considering that company to be the one to help us most in developments. Then the National Lead Company had two companies over there with which they had close connections. One was the Imperial Smelting Corporation—I think that was more a personal friendship and some business done in metals and so on; the other was Goodlass Wall and Associated Lead, in which National Lead had some shares. They had some shares in Imperial Smelting, but not of any importance.

2858 Q. What, in your opinion, did ICI have to offer particularly to this English development?—A. First of all, they represented most of the industry, of the chemical industry, in England. They were not in the pigment field at all themselves. And they had this huge accumulation of experience over there; they had sulfuric acid and factories in many places in England, and sulfuric acid was a very prominent factor in our manufacture. So they were best equipped for that. We also had from the—British Titan Products Company I mean has had a good help from the Imperial Chemical Industry, the cooperation I mean.

The Court. I think we will suspend at this point.

(Adjourned until Thursday, January 25, 1945, at 10:30 a.m.)

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UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, January 25, 1945, 10:30 a.m.

Trial resumed.

GUSTAVE ADOLF JEBSEN, resumed the stand.

Direct examination continued by Mr. WEBSTER:

Q. Dr. Jebesen, yesterday afternoon before we adjourned, I was asking you about the arrangement with the British in 1933, and particularly about the advantage of making an arrangement with the ICI. Before I go on with that, I would like to go back for a moment to another subject. Do you recall when it was that Mr. Beschorman took Mr. McCarty's place with reference to these matters, approximately?—A. I think he had paid a visit, I believe, over to Europe in 1931, yes, in 1931, and touched upon matters at that time a little bit, or had some talks, and then I think—I am not certain whether this was 1931 or 1932—McCarty became ill in 1931 and passed out of the picture entirely in 1933.

Q. Now do you know what sort of work Mr. Beschorman had been doing before his connection with these European matters?—A. As far as I have understood, he was the assistant manager in Cincinnati up to about 1927 or 1928.

Mr. DIXON. If the Court please, I don't want to object, but I think unless the witness is testifying as to his own knowledge, or what he was doing—

The COURT. The objection is well taken. Do you know personally?

The WITNESS. I know he moved East about that time.

The COURT. From Cincinnati?

The WITNESS. From Cincinnati, but I am not quite certain about the exact year, 1927.

The COURT. Are you sure of the exact position he held?

The WITNESS. Yes. He was assistant manager until a few years before he came East, and then he stayed in New York, and I believe his trip to Europe was somewhere about 1930 or 1931, but that his experience was really confined to Cincinnati and as a member of the Board of the National Lead Company.

Q. Do you know whether Mr. Beschorman had ever been to Europe before 1931?—A. Once before on a short trip.

Q. And had he had any experience, as far as you know, with reference to European business matters before that time?—A. No.

Mr. DIXON. If the Court please, I don't want to 2861 object to the question, but I do believe we are perhaps reaching a period now where leading questions at least must be objected to, and within reason.

The COURT. Very well. The objection to the question as leading is proper, and is well taken. If insisted on I will sustain the objection on the ground that the questions are leading.

Mr. WEBSTER. I appreciate that some of these questions are leading. They are really calculated—

The COURT. To save time?

Mr. DIXON. If the Court please, I don't want our position to be that of objecting, but your Honor understands that, and I think that—

The COURT. The real objection is, you suspect he is testifying to matters about which he could not have had personal knowledge?

Mr. DIXON. That is right.

The COURT. I think that may be so, but the witness says he does have personal knowledge, and if you want to examine him as to the sources, I will give you an opportunity to do that on cross-examination, and if it turns out that he has not personal knowledge, it will go to the weight to be assigned to the testimony.

Mr. WHITNEY. I do not want to object any more than 2862 Mr. Dixon does, but I trust your Honor will appreciate the significance of Mr. Dixon's view as to the value of the testimony of his own witness on subjects on which the witness does not have personal knowledge. I hold in my hand some thousand-odd pages of testimony by this witness called by Mr. Dixon, all of which testimony as it relates to my client is not on personal knowledge.

By Mr. WEBSTER:

Q. Now I would like to ask about Mr. Rockwell: When did Mr. Rockwell first begin to have an interest in these Titen Company, Inc. matters?—A. I don't remember that he had any interest before he became president of the company. He may have talked occasionally on the matter but no direct responsibility of any kind before.

Q. Do you happen to recall now approximately when it was that Mr. Rockwell became president?—A. In 1938, I think it was, 1937 or 1938.

Q. After he became president of the company did he personally interest himself in the details of the affairs of Titan Co., Inc.?—A. No.

Q. And were these matters— A. I mean he touched occasionally, naturally, in his capacity as president of the company, but otherwise—

Q. Were these matters largely left to you?—A. As far as Europe was concerned, yes, because I corresponded with Rockwell or Garesche. My correspondence was after Rockwell became president. My correspondence was with him most but it was just keeping him informed.

Q. And during this latter period of Mr. Rockwell's presidency, the head of the titanium division of the company was Mr. Garesche?—A. Yes, but that is what was covered—it covered the United States itself, or the business over here, but not the European business.

Q. Now returning to the British negotiations and agreements, did you know Mr. W. S. Robinson?—A. Yes.

Q. What position did Mr. Robinson have?—A. He was the managing director of Imperial Smelting Corporation. He is an Australian, and his company had an important interest in the Broken Hill mines and the Butma mines, all of which belonged to a group which I think you can sum up in the Imperial Smelting Corporation. I don't know the relations exactly between those.

Q. Did Mr. Robinson have interests in reference to pigments other than this interest in the titanium pigments?—A. Yes. Imperial Smelting Corporation, whose president was Sir Robert Horne, later Lord Robert Horne—he was chancellor of the Exchequer at one time—they had also the firm called the National Smelting Corporation, I think it was, who owned the zinc factories which were built during the last war down in Avenmouth in Wales, and through his zinc interest at one time he acquired a lithopone factory, the most important lithopone factory in England. At what time I do not know but I think it was some time in—the twenties.

Q. Now was there any thought in 1933 or prior to that, in connection with the British arrangements of combining Mr. Robinson's zinc or lithopone interests with the titanium industry in England?—A. I think it was in Mr. Robinson's mind, yes. But I do not think it cut much ice with the National Lead Company. Robinson was an intimate friend, or very good friend, of McCarty; also well acquainted with Mr. Cornish, and he had mentioned to

McCarty at one time, I think that was before National Lead Company took over the majority of the interest of Titan Co. A/S, that he would like—he did not know evidently what the relations were between the Norwegian and the American—that it had been suggested to him by friends that he go into the titanium business. That was only natural for him because he had these big factories down in Avonmouth and had to roast his zinc ore and make sulfuric acid, and he had some difficulties in disposing of that acid, and talking to McCarty he said that if they intended to go into the English market he would be very glad if there could be a cooperation and if they did not want to have any joint enterprise 2865 he would be glad to give him sulfuric acid.

Q. Now what was your attitude, and what was the position that you took with reference to combining the interests of the lithopone and titanium businesses?—A. I was not enthusiastic about that at all.

Q. What was your reason for that?—A. There were several reasons. One was that I did not like to link up too much with lithopone, and the second was that I did not feel that Imperial Smelting Corporation really was the most desirable firm for us to join with at that time. I was not certain that Avonmouth was the place for a factory. However, McCarty was keenly interested in it. He had great confidence in Robinson and thought that his help in the management would be a very good thing, which I think he was right in.

Q. This question of titanium being affected by the existing business in lithopone also had arisen in Germany prior to that time, had it not?—A. Yes.

Q. And what disposition was made of that matter in Germany?—A. The situation was somewhat different.

I ought, perhaps, with regard to Mr. Robinson—well, we will come back to that a little while later. The situation was different. In Germany we gave 50 per cent, rather

the Germans took an interest of 50 per cent in the 2865-A enterprise, and they delivered the raw materials, practically all, 100 per cent. Their interest in

lithopone was 50 per cent, a little less than 50 per cent, in the lithopone convention, so that economically they had a greater interest in developing the titanium than the lithopone, so I felt far better about the thing.

2866 Q. You thought that the connection with the German company was not such as to prejudice the promotion of the titanium pigment business?—A. Yes, not

at all. And I think that is very evident from the agreement we made, because that agreement of 1927, I have not heard anyone who knows about it who does not consider it very, very favorable for us.

Q. And did you find that in fact the German company did promote its titanium business at the expense of lithopone?—A. They put every effort to get the titanium business for us.

Q. Now going back again to the Imperial Smelting Company, what was the situation with reference to the relative costs of sulfuric acid from I.S.C. and from the German company?—A. Yes. I have also another point. When we started we were discussing with Mr. Robinson the position—pardon me. May I mention another thing first?

Q. Yes.—A. When we talked about, when Mr. McCarty took up the question with Robinson more seriously, he asked me what percentage I thought we should give Robinson, or let Robinson have, as an interest in the matter, and I suggested 25 per cent. That was before the other two companies came in, because I said, "We cannot give him less than that."

Now keep in mind that Robinson's concern did not represent very much knowledge of chemical business in itself. They made lithopone. They were very good metallurgists but not chemists. I mean not in the chemical line of the industry, and Robinson had in mind at that time to form, he wanted to form, a commercial white pigment company; trying to get white lead and lithopone and zinc oxide—lithopone and zinc oxide already practically controlled—and titanium together, and I thought it would be most unfortunate for titanium, being a new, young pigment industry, young industry, so I did not feel an interest in it, but anyhow when I took it up with Robinson I said to him that we ought to be able to produce in England at costs which are at least competitive with the Continental costs so that competition from the Continent should not be able to kill us in England, and the most important item was sulfuric acid. You could get the ore from Norway for about the same cost, one way or the other, and he thought he knew acid costs in Germany, and he said, "I know we can deliver at the same price as the Germans." However, when later we came down to discuss the prices it proved that their price was considerably higher than the Germans. The ratios were somewhere about—they would sell somewhere about 50 to 55 shillings

where the Germans were willing to sell at 30 marks
2868 or 31 or 32 marks, around about that. That was the
ratio. And of course with the quantities of acids
necessary, this was a very important item. Now, Robinson
of course could sell at cheaper prices as long as he had
surplus acid.

Q. Was the German company in a favorable position with
reference to the production of sulfuric acid?—A. Well, they
were probably in more favorable position than anybody
else in the world, except perhaps the Dutch and Belgian
industry. Naturally you have got there a combination of
circumstances which was nearly unique. You had got along
the River Rhine all those dye industry factories belonging
to the IG using sulfuric acid in large quantities, and you
know when you make acid you take pyrites which they get
from Spain mostly and burn off the sulfur and then send
the cinders to a copper extraction factory where they
extract copper and they have the iron oxide which remains
and is sent to the steel and iron producers briquetted. As
they were placed along the Rhine, these factories or con-
sumers of sulfuric acid just took the pyrites down to
Duisberg where they had this copper extraction factory
close to the Ruhr district where you had all the iron and
steel producers. That was one thing, and another was that

a factory, that is the one in Leverkusen, which was,
2869 as to European conditions, a very large factory—

I think they made at that time about 150,000 to
200,000 tons of sulfuric acid per annum, and conditions
were very favorable. Another thing was the fact that
during and after the last war, with inflation, the Germans
had got their plants written down to practically nothing
so they had a very favorable condition.

Q. Dr. Jebson, after the British agreement had been
made was there a free exchange of technical information
between the British company and the American company?
—A. Yes.

Q. And between the British company and the German
company?—A. Yes.

Q. Now what effects did that have? What values did
that have?—A. Well, it is a very important thing naturally
to get in every new thing which is formed or developed
as quick as possible into your own factory, and they
visited each other's factories very often, and particularly
in Europe, the German and English ones, and they co-
operated so well that there was—well, Kaegbehn can
tell us about that. There were one or two patents taken

out jointly in the name of English and German chemists— isn't that so? I mean they cooperated by exchanging views, also in developing inventions.

Q. Could you describe the benefits to the Titan 2870 companies and to the National Lead Company of those British arrangements?—A. You mean with regard to their manufacture over here or in Europe?

Q. No. I mean what benefits did the National Lead Company on the one hand and, say, the Titan Company, Inc. or the Titangesellschaft derive from those British arrangements?—A. Well, the outstanding benefit to the National Lead Company was in the technical matter they developed; inventions, particularly in antimony pigment, and when I say an antimony pigment I mean a pigment containing a small percentage of antimony which gave a pigment more chalking resistant than we had before. I believe du Pont developed a pigment on the same lines, so here I think a patent was taken out in du Pont's name. I am not certain about that, but Kaegbehn would be able to tell you about that. Then naturally this British arrangement had the advantage of we giving National Lead Company more profit on the business than otherwise and secured the whole position much better and, well, as a business arrangement it had different advantages—naturally so.

Q. When was the British factory set up, Dr. Jebson?—A. We started immediately after these arrangements were done in 1933 to erect a factory and it was put in operation in the summer of 1934; very quickly done.

2871 Q. And has it remained in operation ever since?

—A. Oh yes, a very nice development.

Q. And has it been in operation during the war period?—A. Yes, and it has its factory placed adjacent to the ICI factory in Billingham and it got sulfuric acid from them, and there has been intimate connections between the staff of those two companies up there, and certain experiments have been carried out with the facility of the British company, of the ICI I mean, drawing on their experience to some extent. We got the manager of the British Titan Products Company when we started from them. The ICI presented one man and the Goodlass Wall presented one of their men for this and it was left to me to talk with them and find out which one to recommend and I took the one from the ICI, Mr. Stopford, who has proven to be a very good choice.

Q. Has Mr. Stopford been over here during the war period?—A. Twice I think it is, yes.

Q. Before the war you were a director, were you not, of the British Titan Products Company?—A. I was a member of the board.

Q. And on those trips of Mr. Stopford's to the United States have you discussed with him a revision of the British arrangements?—A. Yes.

Q. Have you reached an agreement with him
2872 about that?—A. Practically so. We have not signed any agreement, but I think we have got the agreed upon conditions for adjustment which we thought would be more in accordance with the present—what has been criticized here.

Q. Can you suggest to us the main features of the new arrangement?—A. It is the elimination of the territorial restrictions and changing of the exclusive licenses to non-exclusive licenses. That is the main thing.

Q. Is there to be any change in the relative ownerships of the companies in the BTP?—A. Yes. That is another side of the matter; that the English wanted to have a larger share in the business, so instead of National Lead Company owning 44 per cent it would go down to 25 per cent and the rest would be distributed between the English companies.

By the COURT:

Q. Do you propose to continue the exchange of technical know-how?—A. Yes, know-how and non-exclusive licenses.

Q. Tell me, how do you propose to deal with the problem which you were heard upon yesterday where you said where there is competition it is very difficult effectively to operate on a basis of complete cooperation?—A. I am afraid it will have an effect in that way. I am afraid that as time comes it will—

2873 Q. It will break down?—A. It will break down or it will be a looser cooperation than it was. You won't get that intimate cooperation as it was before. You cannot change human nature in those things.

By Mr. WEBSTER:

Q. Has Mr. Stopford stated to you that the BTP, the British company, are prepared to accept these revisions of the 1933 arrangement?—A. Yes.

Q. Dr. Jebson, have you an opinion as to the prospects of the British company after the war?—A. Yes, or rather I would say, basing myself upon what our English friends have expressed in that matter particularly, they are looking forward to a very, very great development. The fac-

tory in Billingham, which has a capacity now of about 7000 tons of TiO_2 , they intend to extend to the capacity which they can have there in that site and in those buildings, which does not mean more than 10,000 tons, and it is planned to have another factory in Grimsby. They are negotiating for the site and I do not know whether they already have this or not, and that is for a similar capacity. Further, they intend to put up a factory in Australia. Mr. Stopford is at present in Australia. He passed here some time ago down to Australia with a view to organizing everything necessary for the erection of the factory and prepare so they can start immediately conditions permit.

2874 Q. Do you still retain your position as a member of the board of the British Titan Products Company?—A. Yes, but it is I suppose seen that I may retire, in that agreement—that is one thing we should mention: In that agreement we have, where it was previously reserved that there should be two members of the National Lead Company appointed—is it two or three? I think it is three—that will be eliminated. Of course it is open to the British to elect members as they want but not as representatives of the National Lead Company.

Q. Does your own experience confirm Mr. Stopford's opinion as to the future prospects of the British company?—A. I think it does. Every reason to believe so.

Q. In the new proposed arrangement with the British Titan Products Company and the other companies that are interested in that company there is no provision whatever, is there, for the continued exchange of technical information?—A. Pardon me?

Q. There is no provision whatever with reference to the exchange of technical information?—A. In the new agreement you mean? In the contemplated agreement?

Q. Yes.—A. Frankly, I don't remember at the present moment. Maybe there is not.

By the COURT:

Q. What would be your forecast then? At least 2875 so long as the present management lives? You know what I mean?—A. Yes.

Q. The present personalities that have developed, intimate friendships and associations over these years—would you really expect to see the National Lead Company rushing into England trying to undersell and take away the customers of the British Titan Products Company?—

A. No, I do not think they could even if they were trying, because we have a custom duty in England too.

Q. Would you expect the British firm as soon as there were not any duty to try to undermine National Lead Company's position with its customers?—A. Well, I do not think so.

Q. You would be surprized if you saw anything like that happen? A. Yes.

Q. Maybe after all the present gentlemen have retired and a new staff of young people who have not been developed—A. Or some other changed conditions of some kind, you know. Stopford is a very keen business man and he will look out for his own interest first, but I suppose he would find it in his interest to not do a thing of that kind.

2876 By Mr. WEBSTER:

Q. You said in answer to his Honor's question that you did not think that the National Lead Company could take an aggressive position with reference to the English market. I wish you would give your reasons for believing that that would not be possible.—A. Well, what I meant was that simply that the English duty is so high. I don't remember how much, but it is so much that it won't pay for the National Lead Company to go in.

By the COURT:

Q. Would that interfere with the National Lead Company building its own plant in the British Isles?—A. No; but I do not see how the National Lead Company would have reason to change their previous attitude or idea of when they go in with a plant they will cooperate with some domestic people.

Q. I quite agree with you.—A. There are certain markets which are more or less natural for companies to work in and operate in and others which are less.

Q. Where it operates under a disadvantage?—A. Yes.

By Mr. WEBSTER:

Q. So it would be your view it would not be feasible for an American company to attempt to capture the English market?—A. Out of the question, in my opinion. You must keep in mind also another thing; that the
2877 British are, after all, very patriotic, very nationalistic in those things. "Buy British" is a slogan which is more than the words. It is a reality.

Q. Have you an opinion with reference to the ability

of the British Company—I am looking at it simply from the standpoint of business capacity or ability in the absence of any agreement or arrangement, or anything of that sort—have you an opinion as to the ability of the British company to import into the United States after the war?—A. Not with the tariff on as it is and I wonder if it can go even otherwise. During all these years, practically up to a few years before the war, whenever we tried to find out whether we could import from the United States—after all, the Titan companies were free to import where we wanted for our own markets—we could not do it on a competitive basis. It did not pay.

Q. What was the reason for that?—A. Of course we had the costs from the Germans, as we could buy from the Germans at cost price, and here the Americans, they wanted cost plus 10 per cent, that is cost price, as you know, due to the special arrangement, and it was only in the last year that we had an opportunity to take some material from here with an advantage. That was partly due to quality too.

Now with regard to the British situation they got their prices fairly well down. I think they must be up 2878 over the last year. I do not know what it was during the war, because they do not give information. And as to costs, too, the British have come down very well with their own production, and naturally when they are going to extend now it is very likely that they will be able to produce cheaper, and with the duty you have got here, and with the situation with regard to the American manufacturer—after all, remember one thing: You do not change. You do not get the manufacturer easily to change from one manufacturer to another of pigment. You have to keep people on the spot and deal with them and handle them and talk with them and get acquainted with their difficulties in the use of this pigment. It takes a long time to get in, naturally, people prefer the domestic manufacturer. You see what I mean? McCarty once said to me: “The lithopone from two factories are not alike even when the factories belong to the same company.”

2879 Q. Just developing that subject a little further, was the European titanium pigment ever quite the same as the product developed over here?—A. No.

Q. What were the differences?—A. Well, there you are getting into very much of details.

Q. I mean, differences in general.—A. But, for one thing, for instance we had over in Europe, the product

was apt to chalk a little bit quicker than here. And for that reason, substantially the same material we sent over from Europe proved not to be quite as satisfactory as the American. There are smaller things, I can't very much explain how you can tell the little differences there may be—in the settling of the material and the surface part and so on, that you have to apply, and so and so.

Q. There are appreciable differences between the products that comes from the different companies as well as products that comes from different countries, is that true?—A. Yes. And even different factories within the same country, too.

Q. I want to turn to another subject. Do you know Dr. Blumenfeld?—A. Yes.

Q. Are you familiar with the process of manufacturing pigments which Dr. Blumenfeld developed?—A. To some extent, yes.

2880 Q. Did you have discussions with Dr. Blumenfeld between 1930 and 1933 with reference to business in Europe?—A. Yes.

Q. Now I wish you would just describe, as briefly as you can, the negotiations that you had with Dr. Blumenfeld, say between 1930 and 1933 with reference to European business matters?—A. Well, that is—

The COURT. That is a long order, Mr. Webster. I was wondering whether you would not accomplish more—whether there are some specific elements which you either want to amplify or, even more importantly, if you want to follow the story as we have it on important matters, whether you could not direct his attention to those specific conversations. I will allow you to lead to that extent.

Mr. WEBSTER. I will undertake to do that. I asked the general question because I thought perhaps that would bring in a number of points that might be covered at perhaps greater length if I were to ask a number of specific questions, but I am quite prepared to accept the other.

The COURT. Use your own judgment. I don't know what this witness is prepared to say, of course, which you do.

2881 Q. What was Dr. Blumenfeld's position, say in 1930, with reference to manufacture in Europe?—

A. He had two companies under his management. One was the Terres Rares, which, I am told from him, and I have no reason to doubt, controlled and owned his patents; and then he had given a license to Societ  Thann & Mulhouse, a French Company, which is one of the

oldest French chemical companies which manufactured in France; and he had given licenses to Montecatini in Italy and had also arrangements with the Aussig, Verein für Chemische und Metallurgische Produktion Aussig in Czechoslovakia, which provided for exchange of know-how of patents and so on. That is as far as I know. I have never seen those agreements, but I am told. And that was in 1930. And his factory in France I understood had a capacity of I believe somewhere about 2000 tons of TiO_2 per annum; I am not quite certain about those figures, but it was in that neighborhood anyhow.

In Italy, the Montecatini Company, in which Blumenfeld had an appreciable amount of shares—I understand that was his compensation for giving know-how and giving license there—the capacity I was told at one time I think was 1500 tons, another time I was told it was 1800 tons, and somewhere about there it would have been. And I think he had given Montecatini permission until 2882 further notice to export to England particularly.

He hadn't disposed of his patent rights in England at that time. Later on he licensed Laporte, or the National Titanium Pigments. And from that moment of course Montecatini could not export to England any more. He himself sold, or Thann & Mulhouse, I mean, in Belgium and Holland, but not very much. His sales organization was not very much developed and he had not, by far, the same technical sales service as we have. We had started such service in Titan Company A/S in 1920, 1921—1921, I think it was, 1922, and when we started in the English market we at once engaged one of the foremost experts in paint and pigments, paint manufacture, a man named Mr. Noel Heaton, who has written books about paints and was considered to be an authority in paint manufacture. And he read papers, gave lectures, and went around and visited the various factories to introduce titanium and studying the difficulties that customers were up against during that time, and so on. He had very heavy uphill work and sometimes he thought the paint manufacturers were too stupid for words as to these things, and so on, because the English paint manufacturers were very, very conservative, so conservative that in talking with one of the largest and most progressive ones when I told him that he could mix TiO_2 and an extender; but why couldn't they buy TiO_2 , blend it there, and 2883 so they would save freight over there. He said, "Dr. Jebsen, for one thing, our paint manufac-

turers are fools, including ourselves. If I go to one of our managers and talk about pigments, if they can press you for a shilling on the price they think they have done a great thing, but if I ask them 'Why don't you mix it yourself and you will save so much' they say, 'I never thought of that.' It is too bad, but, anyhow, it is characteristic of what you are up against."

Q. Let us get back to the Dr. Blumenfeld situation. Did the time come when consideration was given to an arrangement with Dr. Blumenfeld relating to the allocation of business in Europe?—A. Yes.

Q. Was there a conference in Paris in 1931 that had connection with that subject?—A. There were two periods there in that development.

Q. Just describe those, please. A. One was, the talks initiated more or less by Ticknor and Chase from the Commercial Pigments Company over here, who came over to Europe and had also visited Mr. McCarty over here in the National Lead Company, and were interested in getting cooperation in these matters. I had met Mr. Blumenfeld, the first time I met him was in 1922, where I was brought together with him through a Russian living in London, a professor—what was his name, then, I, 2884 don't remember exactly—he was mentioned to me by the former Norwegian Consul General in Petrograd, who was married to one of the Nobel family; and he said his brother-in-law, who was the head of the Russian Nobel family, had recommended this professor or chemist who was in London, who had taken some interest in titanium, and he asked me if I would see him, as he would like to see me when I came to London. I think that was in 1922. And he was very much of a talker and not very much else. But he brought me together with Blumenfeld at that time. And already at that time, at the same time when I was in Paris, talking to Lobstein, Blumenfeld suggested a joint venture, but I was not very much interested about that. They broached the subject at that time. Then I didn't see anything of Blumenfeld for many years until this matter came up through Ticknor and Chase. And at that time we weren't, I was not very much in favor of really getting into any close contact; I investigated it, talked, and naturally I was trying to explore the situation anyhow, to find out what there may be in the matter. But I found that these companies of Blumenfeld were quarreling all the time, and naturally you are not very much inclined to go together with people

who are quarreling between themselves and don't speak well of each other.

Q. Let me get down to the 1931 meeting if I can.
2885 By whom was that arranged, if you know?—A.

That I don't remember, who arranged that. Probably Ticknor and Chase I think, because they came over.

Q. In any event, they were present at the meeting, were they not? They were present at the meeting, that is Ticknor and Chase?—A. It is funny, I don't remember much of that meeting at all, to be frank, and evidently I can't have put much importance to it because—

Q. Did you yourself make any report of that meeting to Mr. McCarty or— A. I found that amongst the papers which have come up now; but I didn't remember anything of it. I didn't report to McCarty about it; as far as I remember. I may have written a letter, but I found there was some memo here amongst the papers which came up.

Q. Did you write some notes that you gave to Dr. Mayer?—A. I don't remember if I did. That note which you found there and which has been—I do not deny that that is written by me, but more likely I have given that to Dr. Kuhne and Dr. Kuhne has given it to Mayer, and so on.

Q. Did you attach any particular importance to that 1931 Paris meeting?—A. What do you mean? I was interested in talking and finding out about these things, and it was fairly clear to me, as far as I remember,
2886 that not anything would come out of this.

Q. Nothing did come out of it at that time?—A. No, nothing did come out of it.

It is an extraordinary thing, but I think it is an indication—after having seen this memo which has been presented here, I wonder why I should never have sent anything of that over to New York. If it had been of importance I would have done so.

Q. There was discussed at that meeting the subject of an allocation of business among certain European companies, was there not?—A. Yes. There you are coming on to another point. That meeting, as I have seen from the memo, it was a question there of getting a technical and commercial cooperation, if I remember right.

Q. Among the European companies?—A. Yes. Now the commercial part was a problem in Europe all the time, not so much of immediate but with a look to the future, because the whole constellation—there you have got—

particularly Montecatini was somewhat of a problem; they had put up this factory and they couldn't place their production in Italy and they wanted to export it. The Italian exchange was very weak, and it was to be feared that Montecatini, if he wanted, could go to the Government, Mussolini, and ask for support in exporting, and that means that he could sell at any price. Now, his

2887 quality wasn't a very good one and varied considerably from the samples we had been able to pick up here and there. And there was a danger, if that kind of quality went around and was sold, that it might do a lot of harm to the reputation of the titanium pigments.

After all we had got—in Norway, for instance, we had experience previously with lithopone, which was introduced to Norway and also to all the Scandinavian countries at a relatively very low price at the first beginning, and was applied here and there and outside, and so on, with very bad results. And the name of lithopone was so bad in Norway that even after the last war, and up in the '20s if you mentioned lithopone the master painters wouldn't touch it, it wasn't any good at all.

Now with a view to all this it was better to get some kind of regulation of these sales. That was one of the problems we had in mind. If you take another situation which occurred very shortly—I think it was in 1933, 1934, where the Germans were competing in the English market with lithopone, and I remember young Robinson, the son of W. S. Robinson, he was the head of what they call the Non-Ferrous Metal Products Company, which were dealing with lithopone and zinc oxide—he said to me, exasperated one day,—he was trying to get the Germans out of the English market where they have been selling 2888 lithopone,—and he said, “It is no use to put the price down because as the Germans are reasoning today, they say the Government says ‘So much for exchange we will have to get from lithopone; you got that before, you have to continue to get it;’ so, the lower we put the price the more is sold of their lithopone because they have to sell it to get that amount of exchange.”

Now, whether he was entirely right or not, I do not know, but there was some support from the Government in Germany for selling material.

The COURT. I think we will take a short recess.

(Short recess.)

Q. Dr. Jebson, you had said that there were two considerations in connection with these European arrange-

ments at this time, and you had discussed one of them. Have you in mind another consideration that was involved, another primary consideration?—A. You mean two periods, or do you mean technically—

2889 Q. I thought you said there were two considerations, one you have just described, and was there also the matter of technical information development?—A. Well, I mean—

Mr. DIXON. I must confess, your Honor, I don't know just what the first one was, according to Dr. Jebesen's testimony.

Mr. WEBSTER. Well, I will withdraw the question.

The COURT. Very well.

Q. Now subsequent to this Paris conference when was it that adjustments were made among the European companies with reference to their participation in business in Europe? When did that come about?—A. When reference was made to—

Q. When was it that there was an adjustment among these European companies with reference to their business in Europe?—A. You mean this Contract of Four and Six and that part of it?

Q. Yes.—A. Well, that was developed slowly after 1933 chiefly—well, some of it before. That was particularly the Aussig concern in Czechoslovakia, Mr. Mayer there, and he was very interested in that question and had several talks with the Germans, with Dr. Kuhne, about it.

Q. Now, the Aussig agreement—A. And that Aussig agreement, yes.

Q. Do you recall offhand the date of the Aussig agreement or the year in which the Aussig agreement was made?—A. I don't remember whether 1933 or 1934, but it was in the summer of 1933 that it practically—that it reached its final form.

Q. What was the purpose of the Aussig agreement?—A. It was chiefly—the main part of it was, I mean from the Titangesellschaft's point of view, was to get the factory occupied. We were dealing there with a factory which had a large, according to European countries, it had a capacity for 10,000 tons of composite pigment, and that was the equipment, and there was room for putting in considerably more equipment. The whole thing was planned for a large development.

Q. You are describing now the TG factory?—A. The factory of TG, yes. And we had been fighting for some years against conservatism—I would rather say doing up

hill work in getting this pigment introduced. Now Aussig had a very small plant more like a pilot plant. The capacity was 500 to 700 tons of TiO_2 . And I know that Kuhne told me once that Mayer had been to Leverkusen and Kuhne had shown him quickly through the factory there, just went quickly through, and that Mayer was very much impressed and said, "It is really only by taking a courageous step like this that we will be able to establish this industry at all." So, he was interested, he was a fairly far-sighted man, and he said, "Better concentrate on getting ahead instead of dividing up 2891 the forces."

Now of course IG and the Aussig people had a lot to do with each other. Aussig was a concern which before the last war had a very large importance in the Austrian-Hungarian monarchy, and after the last war they had to develop on the basis of what was remaining there of the, we might say, the Austrian succession states. They were interested in many products; they had very wide ramifications. In fact, in those countries—they were more or less like the IG was in Germany. So, they had many interests in common, these two concerns. And, therefore, for them it felt natural to develop an agreement of this kind, as defined in the agreement, arrange for a quota in those countries in which they both operated together in titanium, and for supplying such other material from the factory which was then equipped, that is, in this case the Titangesellschaft factory. And it was done on a basis of leaving about, I think it was, one-third of the profit to the manufacturer and two-thirds to the sales organization, if I remember right.

Q. Had that contract been terminated before the invasion, the occupation of Czechoslovakia, do you know?—A. It had a very extraordinary development there because—well, as far as I remember this, the invasion into Czechoslovakia in the Autumn of 1938 led to I think 2892 Aussig—maybe the Town of Aussig or the City of Aussig coming in under German domination, as far as I remember. And the Aussig concern had already started to put up some factories further out of reach of the Germans, in Hruschau for Rhuschan, Czechoslovakia. That is right. The pilot plant, or this plant of 500 or 700 tons, came then within the German domination, and the Government, or Hitler, demanded some German chemical manufacturer to take over that factory. And that was then taken over by IG and another German factory, I have

forgotten the name, fifty-fifty; a smaller manufacturer there.

And then the problem came how to deal with this, and it was arranged in the way that the capacity—I believe that capacity was deducted from the Aussig, those 700 tons which were there, were deducted from the quota which the Aussig concern had the right to have. So, at the same time the intention was not to increase that factory, it was to keep it going and it was. The German Government wanted to keep the population employed to the extent it was employed before.

Then in 1939, when there was a further invasion, there was a question of how to deal with that, but, frankly, the thing became so complicated I didn't—

The COURT. I thought it became very simple.

The WITNESS. No, not so very simple.

2893 Q. Dr. Jebesen, do you recall the contract that we speak of here as the Contract of Four and the Contract of Six? You recall those two contracts?—A. Yes.

Q. Did you take part in the drafting and negotiating of those contracts?—A. Yes.

Q. What was the purpose of those two contracts?—A. The purpose was a similar one as between Aussig and the Titanengesellschaft. In other words, the regulation of the markets with a view of first this Montecatini matter, to solve that problem, and from our point of view we were interested in preventing Blumenfeld from applying for a higher duty in France which he had been indicating several times. We had some difficulty in holding the market in France with the supply from Germany because of the duty and this exchange, the French exchange, going down. And if he had gotten a higher duty we would have—could have been shut out entirely. Naturally we wanted to maintain our market, possibly develop it and gain time until we could put up a factory in France on a reasonable economic basis.

Q. When you say "our interest" you mean the interest of Titan Company, Inc?—A. Incorporated.

Q. And the contract that has been spoken of here as the contract of deliveries was just another feature of that?—A. Of a similar nature as the other one with Aussig.

2894 Q. Are the Contract of Six and the Contract of Four and the contract of deliveries still in existence?—A. The contract in which Montecatini was interested was terminated by them, as far as they were concerned, in, I

think it was, the year before, about in 1939, maybe, or 1938; I don't remember exactly now, but you can find it in the papers somewhere. And there was no continuation of the agreement, it was stopped, except that it was understood that we will see if we could get some kind of an arrangement, and in the meantime carry on as best we could in the matter. The contract with the French company, when the war broke out, of course those things stopped, you couldn't any more; I mean, everything was disrupted and there was nothing more in it.

Q. Have you dared to form any opinion at all as to what may happen with reference to these matters that were involved in these contracts after this war?—A. No. I am entirely blank. After all, who can tell what is going to happen? I mean, first of all, if there aren't going to be any peace treaties, what will be the legal situation between these countries and so on?

I would like to mention one other thing you talked about yesterday, whether I thought these contracts were in existence or would continue after the war and I said I did not know. I mean, after all, that is a purely 2895 legal matter of a business—a treaty matter, when the time comes. And, of course, there is, regarding the 1920 agreement, a question of not only the American Government's decision but also the question of the Norwegian Government's attitude, because the Norwegian company, Titan A/S may be still responsible for those agreements which have been taken over by Titan Company, Incorporated. But I suppose—

The COURT. Has Leverkusen been bombed?

The WITNESS. Well, we have very little news. I had a letter from our people in France after France was liberated, and according to that it seems that there has been very little harm done to the factory.

Q. Now, Dr. Jebesen, I think all of the matters that have been discussed up to this point with a few exceptions have related to situations inside Europe. I now want to ask you a few questions about the arrangements in the United States. There is in evidence here a contract between the National Lead Company and the du Pont Company made in 1933. Did you have any part in the negotiation of that contract?—A. No, practically none, except when it was negotiated it was submitted—it was sent to me shortly before, in principle, the thing, and that was early in 1933.

The COURT. Weren't you the fellow that was supposed to sell it to the Germans?

2896 The WITNESS. Yes, but that was not the negotiation of the contract between du Pont and National Lead.

Q. When that contract was brought to your attention, or the draft of the contract, did you observe any important difference between that contract and, say, the 1920 agreement?—A. Certainly. There was a very wide variation, very wide.

The COURT. The agreements speak for themselves. While this may have been very exciting on December 6th, it is now January 25th.

Q. If I may refer to the contract itself, you did recommend to the German company that it consent to the Lead Company making that contract, did you not?—A. Well, I will have to take the story a little bit earlier than that part of it.

The COURT. That is what I was afraid of.

The WITNESS. Yes, but I shan't go into the agreements themselves.

The COURT. All right.

A. (Continued) But when it was sent over to me for my consideration and also with the request of exploring the attitude of the Germans, I wrote back and pointed out the differences that I shan't go into now, and then I didn't hear anything until Beschorman came over, and he had a contract with him, the way it was to be signed. And 2897 I told him the same thing. So he said to me, "Well, we have got to sell the agreement to the Germans." He thought it was important for the National Lead Company. I was not in agreement with them to be quite frank, I did not like the idea as it was. And then we went to the Germans, went to Leverkusen and Beschorman presented the agreement to Dr. Kuhne.

By the COURT:

Q. Before you go into that, did Mr. Beschorman indicate to you why he felt that it was so important for National Lead to make this deal?—A. No. He was a very self-willed person.

Q. He did not say to you, for instance, "You know that du Pont is a very powerful organization and if they decide to fight with us on this proposition we will probably take a licking"?—A. No.

Q. He did not say that?—A. No, not at all.

By Mr. WEBSTER:

Q. You did give a half-hearted endorsement to this—

A. Well, wait a minute. Then when Beschorman had talked with Dr. Kuhne, Kuhne did not go into the agreement at all, but just said that the legal department would go through it and he then answer it, and he had no doubt that the thing would be all right, because National Lead Company was fifty per cent interested in the German 2898 company, and so on.

When I was asked to come to Frankfort some time later, then I was faced with a whole situation there, because then they put up these questions, and they put up quite a number of objections the same as I have put up to Beschorman and to over here; there was no denying those things. So I just told him that those objections have already been sent by me to National Lead Company earlier. And the result was, however, that this was not consented, evidently the National Lead Company had not got any further with the du Pont Company. And I said, National Lead Company wishes to make this agreement but it is dependent on your approval. They said, "Well, isn't it signed?" I said, "No, it is not signed, and now it is up to you."

So I put it to them straight, whether or not—now, they, were very desirous of pleasing the National Lead Company; the cooperation had been a good one in every respect, and naturally they felt that if they did not sign it the atmosphere might become colder than otherwise, the temperature may sink. So, they wrote them their objections to the—over here to the National Lead, as you will have seen from the correspondence. And then I came over here and had a talk with Mr. Rupprecht about it.

The COURT. Was that before the agreement was 2899 signed?

The WITNESS. That was before the agreement was signed. You can find this in the letters.

A. (Continued) And there I finally said that in view of these various pictures which have been worked out—"that it will be eminently satisfactory in the end, and so on," it seemed to me that National Lead Company—that the Titangesellschaft may have important benefits out of this. It was in my opinion a lukewarm explanation of: Well, go ahead and sign it and take your chance in the matter.

Q. Did Mr. Rupprecht at that time, that is, 1933, accept the provisions of Article XIV of the 1920 agreement?—A. No.

Q. Did Mr. Rupprecht ever accept the provisions of

Article XIV of the 1933 agreement?—A. No. I often ask myself sometimes—but I never got him. He was too slippery for that, quite frankly.

By the Court:

Q. What did he say? Can you remember the words?—

A. No.

Q. The substance of what he said?—A. No. The substance is what you can see was more or less expressed in this letter he wrote.

Q. Tell me about it orally. I haven't seen the 2900 letter for some time—A. Well, he said that, after all, we haven't exported to these countries, you are protected by patents in these countries; how can we export? And I think the whole thing will work out to be eminently satisfactory to you.

He talked about the non-exclusive licenses, which I didn't like at all and which I couldn't see the reason for. He said that it was a rule from the executive committee or finance committee not to part with any property entirely; they have to put it up—if he should give an exclusive license it will be tantamount to parting with the property, and he would have to put it up to the executive committee, and he thought that they are not—that the approval would not be given.

He used that executive committee as something which he could not work up against. Of course I thought it was a very unsatisfactory way of handling this, and, frankly, I thought it was not quite the way I think National Lead Company should accept the treatment of that kind. But, nevertheless, at the same time he said it would work out satisfactorily.

Beschorman was very keen on having the thing done. I don't think Beschorman really understood what the whole thing was about. And, that he expected a certain amount of advantage in getting technical information and engineering service and so on from the 2900a du Pont Company. I think he and Thompson were rather fascinated by the big du Pont Company and so on, which I think I wasn't quite so impressed with. But, finally, after all, I was an employee of the National Lead Company, and found that I would have to help the matter along.

2901 The COURT. You were a good soldier.

The WITNESS. Yes.

A. (Continuing) And then, as you have noted, I think

the Germans in writing back, they accepted the situation; in other words, they refrained from any legal or contractual basis for complaint, but at the same time they tried to emphasize what their position was, the basis, so that they had every opportunity to grumble afterwards if the thing should not work out to be eminently satisfactory.

By Mr. WEBSTER:

Q. Now, Doctor, I am coming to another subject. Did you have anything to do with the negotiations between BTP and Laporte in 1936 to 1940?—A. In 1940 not at all. I was over here. In 1936—1936, I thought it was a bit earlier—I was sitting in on some talks with them, but the negotiations was left first to Stopford and Thompson of R. W. Greeff, and later Tasker came into it, the talks between them, and I was sitting in on a few of those talks.

Q. That was a matter between BTP and Laporte with reference to a domestic situation, was it?—A. Yes.

Q. And you had knowledge of that as a member of the board of directors of BTP, is that right?—A. Yes.

Q. But, as I understand it, you were not one of the negotiators of that arrangement?—A. No, I was
2902 not one of the active ones.

Q. I would like to have you, if you will, describe just as briefly as you can the situation which led up to the arrangements with the Japanese. Now I am going to ask you the general question in the hope that you will just take us through that as quickly as you think you can and give an adequate answer.—A. Well, the first contact with the Japanese was a visit by Mr. Fujida to our Norwegian factory in 1920. I was not there. I was over here at the time. And then he started to buy from the Norwegian company, and we let him do so—we sold to him but not to anybody else, but without having any specific arrangement.

The COURT. That is the Fuji Paint Company?

The WITNESS. Fuji, yes, I think that was. Fujida was the name, anyhow, of the man.

A. (Continuing) Then when the German—when the Titangesellschaft was formed and Japan was included in their territory, after awhile we gave the agency, that is, Titangesellschaft gave the agency, to the Doitsu. IG's company over there, and continued however to work with this paint company. And as sales developed I understood from the Germans that Fujida was trying time after time to get us interested in putting up a factory in Japan.

2903 Finally, it was the same story as in certain other countries—the exchange became weak and licenses—importation became more difficult; there was a question of getting licenses from the Government, importation may have been forbidden, which is very soon after we had made the arrangement.

So, it was considered, in order to hold that market, considered vital to put up a factory there and naturally, following the then policy, as we have been doing all the time, trying to take a domestic partner, and of course Fujida, who was the man who had worked up this idea and done the work; he was the nearest to be chosen. I didn't know that Fujida, which proved advantageous, was connected with this larger concern, Kokusan Kogyo, and I think that was again connected with the still larger Nippon Kogyo—these names are in these letters or reports somewhere—and so then it was divided fifty-fifty.

Now we had our arrangements with Blumenfeld, and naturally the question was of taking him in at the same time. I mean, that would be the fair thing to do, not to leave him out in the cold, I mean, if this—

Q. Well, he had actually received consideration with reference to the Japanese market, hadn't he, on the contracts of Four and Six?—A. Yes. But naturally we could

2904 have put up a factory in Japan without him if we wanted to. But we thought this was best, to take him in on the enterprise there. But at the same time we did not want a technical cooperation because of all these reasons, I don't need to have to repeat them, in exchanging licenses and know-how and so on.

So, therefore, it was arranged, the way you can see from the agreement, that the license was given from the Titangesellschaft through Doitsu to this new concern, or to the Titan Kogyo. And Blumenfeld gave an option on his patents which could be used in case sometime in the future a general cooperation should develop.

And then, with regard to share capital, well, it was divided up between the Blumenfeld concern and ourselves in the same proportion as the quota, 70-30.—

Now these shares, our shares, I mean the National Lead Titangesellschaft and so forth, should really have been—it was in cash then—should have been taken out by the Titangesellschaft if we had followed the ordinary practice of the thing. Then, however, it was decided that instead of Titangesellschaft doing it, because of exchange difficulties, it should be I.G., which took the one half, and Titan

Company took the other half.

Weber Andreae, one of the I.G. directors, was over here on a visit and talked to Beschorman and asked him if

National Lead would—or Titan Company, Inc., 2905 would take on a cash payment for them because they had difficulties in providing the cash under the regulations in Germany, and Beschorman agreed to it. And it came up with me afterwards in Europe, and he told me Beschorman agreed, and I had no objection to it. After all, it was a relatively small amount. The idea was that the I.G. should buy the shares back after a certain period, they should pay an interest at five per cent or six per cent, I don't remember now how much, or be charged for that; and whatever came of dividends should be deducted, and so on. It looked as if the possibilities for the future of that company will be so good that, probably there would not be much to pay when the time came.

And it wasn't only those cash shares but also the shares for patents and good will, which amounted to a considerable amount. The first capital there was 1,500,000 yen, of which 750,000 came under the European-American part. We had 70 per cent of that. And I think that of the 70 per cent of 750,000, that is about a little over 500,000, we had to pay in cash was a little over a hundred thousand yen.

Q. Did the company engage in actual manufacture?—A. Yes.

Q. Did it do so successfully?—A. As far as I know, yes. It had quite good sales, according to the reports: Now, keep in mind; it was the Germans naturally having the organization in Japan, who took care of the thing.

Q. Do you know the tonnage that was produced there before, say in 1941?—A. No, I would not remember now, but if it is of interest, we can find those figures.

Q. You have no present recollection?—A. No. But I think you must have those figures somewhere in the offices.

Q. Dr. Jebson, are you in a position to express an opinion concerning whether it would be feasible or whether it would have been feasible for the National Lead Company independently to establish a factory and business in Japan?—A. I do not think it would have been possible. Well, less there than anywhere else.

Q. Just state briefly your reasons for that?—A. Well, I mean the National Lead Company had no business in Japan, we had no business in Japan otherwise, I mean

except through this Fujida, and conditions in Japan of course are so foreign to us. It would just have been a gamble.

Q. Do you think the Japanese could have engaged successfully in importing titanium pigments into the United States?—A. Except with dumping and Government support, then you can do anything, practically, if they were going to; but even so, it is a matter of quality, 2907 too. With the quality, keep in mind I have never seen the product which they made, but a very large part of it went into face powder.

The COURT. Face powder?

The WITNESS. Face powder. That was the most important sale that they had for quite some time over there, so I am told.

Q. Now, Doctor, I want to ask you about the situation with reference to South America. You mentioned yesterday that when the 1920 contract was made, both companies desired to engage in business in South America, and that was left open to both companies?—A. I beg pardon?

Q. I say, you said yesterday that both companies were reserved freedom for operation in the countries of South America.—A. Yes, as far as sales are concerned.

Q. Now later was anything done about the rights with reference to the sales by the Titangesellschaft in South America?—A. Any arrangements were done between the Titan Company A/S or Incorporated and the National Lead Company.

Q. No. Did something happen later with reference to the Titan Company, Inc., and Titangesellschaft with reference to South America?—A. Yes. We left it to the Germans to operate that market.

Q. What was the reason for that?—A. The reason 2908 was that we had, Titan Company, Inc., had practically no connections of use in South America. We hadn't found any agents who could operate for us who were satisfactory. I think it was more or less incidental what we sold down there. And Titangesellschaft, the Germans, were hammering all the time and keeping pestering me for getting larger markets, and they had their organization, they had companies of their own in most of the countries down there, so it was very difficult for me to deny them to sell down there; they had a very good organization for it. And our experience was that one had practically to put up more or less our own organization, to get the pigment introduced, or you had to work very

closely with the agents—a very close cooperation. We had the experience in Belgium and Holland, for instance, that the agency we had there didn't work. We had a very highly reputed, a highly renowned firm, Peter Schoen, who worked for us in Holland and the results were very unsatisfactory. We had an agent in Belgium which also was very unsatisfactory. So, finally, we put up our own organization there, formed our own little company for doing these things, and it was only after that that we really got our pigments introduced in those markets.

Now, in South America we couldn't do much, and 2909 they had an organization for the work. And they took on, very energetic on it, immediately afterwards. They sent over a chemist to investigate the situation, a pigment paint chemist: however, he came back with rather disappointing reports. He found that the consumption of white pigments in those countries was not a very large one at all.

Q. Has that market in fact ever developed a very large consumption of that product?—A. Not a very large consumption.

Q. Mr. Williamson wanted me to make it quite clear that your testimony with reference to South America relates only to the Titan Company, Inc. and the Titangesellschaft, and that it does not include in any way the National Lead Company.—A. No, we acted entirely separate from each other.

Q. You were not in a position to make any— A. I was not familiar and I am still not familiar really with what the National Lead Company did down in South America.

Q. You were not in a position to make any arrangements on behalf of the National Lead Company and you did not do so; is that correct?—A. Yes. I only did it on behalf of Titan Company, Inc.

Q. Now, Doctor, did you have anything to do with the Canadian arrangements that were made about 1937?—A. No.

2910 Q. Did you have anything to do with the arrangement that was made with the Zirconium Company?—A. No.

Q. Did you have any part in the negotiations with the Virginia Chemical Company?—A. No.

Mr. WEBSTER. That is all.

By the COURT:

Q. Dr. Jebesen, what was the total production say about

1939, or 1940, on the Continent of Europe of titanium composites or TiO_2 , as you prefer it?—A. Well, I expected the question but I wanted to see our report, annual report, to be quite certain, to refresh my memory about it, and perhaps I can do it—

Q. Can you give me a round figure?—A. I think in 1939, I think the factory in England produced somewhere about 5000, 6000 tons of TiO_2 , somewhere about that, I think. And the Germans somewhere about up to 10,000, I believe 15,000. And then you have the Blumenfeld concern and Laporte, I would say about 20,000 tons of TiO_2 .

Q. How about the United States?—A. I am making this observation, your Honor, because I am not at all certain about these figures, but they can be had here; we have them in our files.

Mr. WEBSTER. They are contained in your annual reports, are they not?

2911 The WITNESS. In the annual report, yes.

Mr. WEBSTER. Which have been turned over to the Government.

The WITNESS. Very, very detailed statements there.

Q. What is your impression of the American production?—A. At that time? In 1939? Well, I think my impression was that they were about three or four times, about four times as high.

Q. Do you run from eighty to a hundred thousand tons?—A. Yes, somewhere about that.

The COURT. All right.

2912 Cross-examination by Mr. Dixon:

Q. Dr. Jebsen, we went into some of the provisions of the 1920 contract rather at length yesterday. It was one of the purposes of that contract, was it not, to allocate to the companies, that is the two companies who entered into it at that time, Titanium Pigment Company and Titan Co. A/S, certain exclusive territories in the world in which those two companies would confine their manufacturing and sales activities, is that correct?—A. Yes.

Q. And it was also one of the purposes of making the division of territories to prevent competition from the other company coming into that territory of the other company without the approval, and subject to such price regulations and control as might be placed upon that business by the company in whose territory such exports may have been made?

Mr. WEBSTER. Just a moment. I am not going to interrupt at all if I can keep from it, but I would ask to have the question so framed, that some consideration be given to the form of the question so that the witness will be sure to understand. It was five minutes I think after the first word before I finally heard the verb.

The COURT. Are you apprehensive of the witness's capacity to comprehend it?

2913 Mr. WEBSTER. Not at all.

The COURT. Because we are dealing with a highly trained witness.

The WITNESS. The first time I am a witness.

The COURT. I did not mean highly trained witness but highly trained gentleman, and I will instruct him now to make sure of this:

If the question put to you is not clearly understood you may so state and I will see that counsel reframes his question so that you do fully understand. I don't want your answer to a question which you do not fully understand and are satisfied that you understand.

Now do you understand the last question?

The WITNESS. Yes, I believe I understand.

Q. Thank you, Dr. Jebesen.—A. But keep in mind the purpose. This territorial division was a means to an end. It was not a purpose. It was a means to an end, the end which I pointed out yesterday, of creating conditions which made full cooperation on the technical side possible.

Q. But one of the purposes, as I have stated, was to enable the companies, say Titan Co. A/S in 1920 or any time thereafter, including the Titan Company, to control any imports of titanium pigments into that particular territory of Titan A/S or Titan, Inc., wasn't that a fact, Doctor?—A. Not any imports.

2914 Q. Within the Licensed Field?—A. Yes, but I mean only from the company who was cooperating, yes.

Q. That is right. In other words, any company—A. To put it straight, in order to get a full exchange of information and technical knowledge we wanted to prevent competition of a commercial nature.

Q. So the purpose of the exchange of the technical information which you have mentioned was also to prevent what we will call, and I believe you have sometime referred to, technical competition, is that correct, Doctor?—A. Technical competition.

Q. So that as these various companies like TG and

BTP and Titan Kogyo were allocated particular portions of the territory originally allocated to Titan A/S under the 1920 contract, these new companies enjoyed the benefits of the corporation, of technical cooperation, did they not?—A. Yes.

Q. And they also enjoyed the benefits of no imports by any of the other companies into their particular territories without their approval? That is also one of the benefits, was it, Doctor?—A. Yes. It appears from the contract itself.

Q. And as these companies grew and as this business developed in the manner that you have described, the value of that lack of competition or the threat of 1915 competition from imports into the territories of TG and BTP became greater, did it not, Doctor?—

A. Perhaps so. I would not say absolutely, but perhaps so. I mean it depends on so many factors which are coming in.

Q. But at least it is your position that BTP's position in its territory was strengthened by the increased production of the plant supplying that exclusive territory; it obtained a stronger position in its exclusive territory, did it not, because it had nothing to worry about, assuming it were possible, from imports into its territory?—A. I do not get that question.

The Court. Reframe it.

Q. These various factories that were ultimately built in the exclusive territories allocated to those companies started off with a small capacity, didn't they, Doctor?

The Court. Small production?

Mr. Dixon. Production, rather.

A. Well, we started with a relatively small production, compared with United States production, but we tried to start out these companies, these factories, as I mentioned before, at the time when a certain minimum outlet was developed, certain minimum consumption was developed, so that they should have a reasonable economic basis to stand upon.

Q. And until the capacity of the factory in that 1916 exclusive territory developed to a greater capacity, or as its capacity increased, the market in which that particular factory was then built would be taken care of, if necessary, by the imports from the other territories where the factories had a larger capacity; that is true, isn't it, Doctor? Do you understand my question?—A. Not quite. Of course, as I have explained, I mean we

developed the market in England by deliveries from Germany until its factory was ready for operation.

Q. And as soon as—

Mr. WEBSTER. Just a minute. I think he ought to be allowed to complete his answer.

The COURT. Had you finished your answer?

The WITNESS. Yes, if I understand your question right.

Q. And as soon as the British factory developed larger production then the imports from the German factory stopped? That is what happened, wasn't it?—A. As soon as the British factory started operation and could give a supply to the customers then of course the German imports stopped, because the British company had got their exclusive licenses under those patents—under the patents. Importation could only take place with their approval anyhow.

Q. Of BTP in its own territory?—A. Yes, in this case.

2917 Q. And if BTP said to TG, We don't want any more imports into our territory, they would have ceased under the 1920 contract, wouldn't they?—A. Under the 1933 contract and 1927 contract.

Q. Now the various Titan associated companies had what percentage, would you say, of the market capacity of the territories outside of the United States with reference to the whole market for titanium pigment?

The COURT. I do not follow your question. Do you mean under the Blumenfeld deal?

Mr. DIXON. That is right.

A. You mean the potential capacity or do you mean the capacity—

Q. I will withdraw my question, Doctor. The only other group producing titanium pigments throughout the world, exclusive of the United States, was what we have heretofore called the Blumenfeld group, is that correct?—A. Yes.

Q. And they started in the titanium business I believe about the same time as Titan A/S, didn't they?—A. No. I think they started in considerably later, several years later.

Q. Well, you started in 1916, was it, in Norway?—A. We started our factory in 1916 and we started operations in 1919.

2918 Q. And Blumenfeld had Thann & Mulhouse in France with a factory in about 1922, didn't he?—

A. I did not know, but I believe so, because as far as

I remember it was only in 1922 that—well, in fact I did not know of Blumenfeld actually being active in titanium before I met him in Paris at that time. There may have been some patents, but frankly not that I was personally much aware of that fact, and I suppose it was round about that time that he started to put some pigment on the market. I do not know, but I suppose that is the case.

Q. Well, the only other companies manufacturing titanium pigments in Continental Europe up until say 1928 were the Blumenfeld companies and your own companies or the Titan companies? That is correct, isn't it?—

A. Yes, with one little reservation. I cannot give you a definite date as to what Auer Company did.

Q. You mean Auer—A-u-e-r?—A. Yes, Auergesellschaft.

Q. That company finally went out of business?—A. Yes, but they had spent seven to nine million marks on their business before they closed down.

Q. So excluding the Auer Company, the only other group of companies operating in Continental Europe up until 1928 were your groups and the Blumenfeld groups?—

A. Yes. May I just mention one other thing, and that is in France, when you talk about these groups, 1919 there were two inventors, Carteret and Devaux.

They had a pilot plant in France which was visited by Mr. Hallett of the National Lead Company in 1928 or 1929, I believe, where they were making some titanium pigment. But as to what you may call the serious competitors, it was Blumenfeld at that time.

Q. Do you know what proportion of the total titanium pigment market was supplied by the Blumenfeld companies in Europe in 1928 approximately?—A. No.

Q. Well, in any event I believe we can say that about that time your companies, the Titan companies and the Blumenfeld companies were the only groups commercially engaged in the business in Europe at that time? That is correct, isn't it?—A. I think so.

Q. So that the only competition that the Titan companies had from European companies in 1928, of a commercial nature, were the Blumenfeld companies?—A. Commercially, yes.

Q. Now, you had no competition from any of the other Titan companies, as you have stated? That is correct?—A. Commercially?

Q. Yes, except that imports were made into the Titan territories at the request of the Titan companies. That is a fact, is it not, even in 1928? Is that a fact, Doctor?

Mr. WEBSTER. Again I apologize for interrupting, 2920 because Mr. Dixon was considerate of me when

I asked general questions, but he talks about the various companies, and the various countries, and the Titan companies and the associated companies with reference to events that were perhaps of some importance here all in one big lump, and I do suggest that he be instructed to try to specify so that Dr. Jebsen can give a more or less specific answer on that.

Mr. DIXON. The witness has not stated he does not understand my question.

The COURT. That is what I was about to say. Go ahead.—A. May I just, for the sake of clearness, say I understand the Blumenfeld companies, the Thann & Mulhouse at that time, Thann & Mulhouse and Montecatini and Aussig, as far as Europe is concerned?

Q. That is right.—A. There was in London a group which was promoted by a man by the name of Tilden-Smith and he operated with a company called the National Titanium Pigment Company which later was taken over by Laporte. I don't remember exactly the dates when he started to introduce his pigment. He sent it around to the various paint manufacturers. It may have been a little later or maybe been a little earlier. I cannot say. I would like to make that one exception.

2921 Q. Do you know whether the National Lead Company was importing into the British market in 1928 and 1929?—A. I do not remember. We took once or twice some material from the National Lead Company over to England but I cannot say exactly the dates and the years. There were a few times.

Q. So that at that time, at the end of 1928, you really just had the two groups in Continental Europe, the Blumenfeld group and the Titan group?—A. Yes, of commercial importance, yes.

Q. And the Blumenfeld groups, so-called, were beginning to seriously and substantially compete in the European markets with your companies? That is a fact, isn't it, Doctor?—A. Yes.

Q. Now the Montecatini Company was even exporting outside of Continental Europe, wasn't it, at that time?—A. Exporting to England.

Q. Do you recall whether they were also exporting even small amounts into the United States around 1930, 1931 and 1932?—A. I do not recall, but I have seen that in some of the papers mentioned here. Of course I was

not very much interested in what exports took place into the United States.

Q. But you always kept National Lead informed of what was going on with reference to the European 2922 situation?—A. Yes.

Q. And the activities of the Blumenfeld companies were reported to the National Lead Company?—A. Yes, as far as I knew about it.

Q. Now this technical cooperation, this other factor in these agreements, that was a very important factor underlying these agreements, wasn't it, Doctor?—A. The technical cooperation, yes.

Q. And as a result of that technical cooperation flowing between and among the various members of the Titan group you obtained distinct advantages, did you not, in the technical operations of this business over any other company that did not have that available to them?—A. Yes. I think that was a very constructive part of the whole thing.

Q. And these exchanges of information relating to the working out of the technical problems of this industry also in many cases resulted in patent collaboration, did it not? That is collaboration in patent applications in the titanium pigment business?—A. I do not quite see what you mean by "collaboration."

Q. All right. I will ask you another question: You mentioned yesterday, as I recall it, that TG developed a new product, I believe around 1935, Rutiox, with a very high hiding power?—A. In the laboratory.

Q. And it is a fact that when that product was 2923 discussed at your, shall we say, international committee meetings that the British companies and their research divisions did aid and collaborate with the German companies on the working out of the details ultimately leading to patent applications on that product?—A. They took up the work in the Rutiox matter also.

Q. So there is one example to answer my question as to whether or not this technical cooperation between the companies resulted in joint patent collaboration on applications?—A. Yes.

Q. And there may have been others I presume. And of course when these patent applications were filed and patents issued, or when they were filed, all of the information relating to those new applications was immediately available to all the other Titan associates, wasn't it, in-

cluding the National Lead Company in the United States?

—A. Yes. When you say "immediately" I mean——

Q. Well, in the ordinary course of business?—A. Yes.

Q. The transmission of that information would make it available to all the Titan associated companies?—A. Yes. May I just mention when you talk about patent collaboration, as far as I understand what you really mean here is technical cooperation in those developments.

Q. Well, I had gone beyond that, Doctor. I had brought it to the stage of the patent applications, and
2924 when it had reached that stage, before a patent had issued, whatever was covered in that application relating to any improvement on any of the processes you were then using was immediately available, was it not, to all the other Titan associates?—A. Oh yes, that is right.

Q. And of course it was not available to anyone who was not associated with the Titan-National Lead companies?—A. Yes.

Q. And when you made the Aussig and Contract of Four and Contract of Six agreements in 1933 and 1934 that exchange of technical information was not provided for from the Titan companies to the Blumenfeld companies in those contracts, was it?—A. No.

Q. It was just a commercial arrangement in those contracts with the Blumenfeld companies?—A. Yes, but there is one thing in those agreements where we talked about patents too, and perhaps I should make that clear, and that is where it was a question of patents regarding applications of our pigments use patents. They were made available for both parties to the purpose of facilitating the sale everywhere around.

The COURT. Even with the Blumenfeld's?

The WITNESS. Even with the Blumenfeld's. In other words, we could not use a patent involving the use of titanium to prevent Blumenfeld from selling to the customers.

2925 Q. That was arranged and provided for in your contracts with the Blumenfeld group?—A. Yes. You will find that in the agreements.

Q. But apart from those contracts with the Blumenfeld group it related to a commercial control of those markets by your Titan companies and the Blumenfeld companies; that is a fact, isn't it, Doctor?—A. Yes. Well, as far as those sides are concerned. If somebody else came in it would be a different matter. It would be beyond our control.

Q. Someone did try to come into the Dutch market in 1939, didn't they?—A. Yes.

Q. And it was immediately decided by the Titan companies and the Blumenfeld companies that no arrangement should be made with van der Lande, this new Dutch company?—A. I would not say immediately. We were watching the van der Lande Company as it developed. We were trying to find out what kind of people they were, and the information we got was that they were people who repeatedly had taken up, apparently, a new production with no purpose of really going in, but after they had made themselves a nuisance they just took some compensation for dropping out.

Q. Did the Titan companies ever pay van der Lande any money? A. No. We did not fall for that.

Q. It was decided rather to fight them to co-
2296 operate with them? Is that the position taken by your two groups? A. Yes. I would not say it really came to a decision, but Blumenfeld told me about it, that he had an opportunity, he had heard van der Lande would be willing to make some arrangement, and I said, "I don't think we should do so," and that is what it was left to. That competition was not so serious at that time that I would call it a decision. It was not under a very serious consideration.

Q. It never really got started? Is that a fair statement, Doctor?—A. Yes, and I do not think they intended to get started. I think they intended, what they had done before in other cases. They did not have a real staff of people. What they had done was they got hold of a master mechanic from the Auer Company and was trying on the basis to do something.

Q. Now, Montecatini was exporting not only to all the other countries of Europe but also to England before Contract of Six was made, wasn't he, Doctor?—A. All of the other countries? I do not know. But he was exporting to England anyhow.

Q. And after Contract of Six was made Montecatini did not export into the British market any more, did he?—

A. I don't know exactly—

Q. As long as that contract was in force?—A. I don't
2927 remember when that was, but after the contract was signed Montecatini exported to the extent that was provided for in that contract.

Q. In other words, the competition from Montecatini

in the other territories that had existed theretofore—

A. Was regulated.

Q. —was stopped, wasn't it?—A. Was regulated.

Q. Was regulated, yes. So that when these agreements were completed with the Blumenfeld companies in Europe, you had a completely stabilized or regulated market in the titanium pigment business? That is a fact, isn't it?—A. I should explain a little to you there how that kind of thing worked.

Q. Well now—

Mr. WEBSTER. Just a minute.

The COURT. Answer the question first and then give your explanation.

The WITNESS. I think I need that explanation as an answer for your question when you ask about completely regulated and so on.

The COURT. All right, go ahead.

A. There is still a competition going on in that kind of thing. For instance, Blumenfeld and our people, they competed and they fought each other in order to get customers, even took customers from each other even after that agreement was made.

2928 The COURT. What is the point of that?

The WITNESS. Two points. One was that these agreements after all are relatively short termed. We had our sales agent and he had his commission. He was interested in selling as much as possible. He could not cut down the price. The price-cutting competition was eliminated by those agreements, and compensation for oversales was arranged for when the year was over, but after a period of two or three years the question of quota could be taken up for revision.

The COURT. We will suspend at this time.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

GUSTAV ADOLF JEBSEN, resumed the stand.

Cross examination continued by Mr. DIXON:

Q. When we adjourned for lunch we were discussing the contract the Titan companies made with the Blumenfeld companies after 1933 in Continental Europe, and that customers were also exchanged between the companies in the various territories allocated to the Blumenfeld and Titan companies under those agreements, were they not, Dr. Jebesen?—A. Not that I know of.

Q. Don't you recall in 1939, I believe it was, that you referred in some of your reports to giving some of the customers to Thann in its territory?—A. To Thann?

2929 Q. Thann & Mulhouse, yes.—A. No. I do not recall. It may be the case, but I do not recall.

Q. Well, in any event in working out the quotas agreed upon for the markets in those territories covered by Aussig, Four and Six Contracts there was commercial cooperation between your group and the Blumenfeld groups to regulate the markets in those territories?—A. The sales—Yes.

Q. And they were governed by those contracts within the territories, is that correct, Dr. Jebesen?—A. Yes.

Q. Now during this period of time you mentioned the British Laporte Company, that was the other producing company in England, was it, apart from BTP?—A. Yes.

Q. And BTP had a price arrangement with Laporte covering the prices of titanium pigments sold in the territories of Laporte, and British Titan Products Company, did they?—A. Yes. I don't remember exactly the time when it started, but anyhow it was so.

Q. And after the Laporte Company took a license from Blumenfeld Laporte no longer competed in Titan's territory outside of the British Empire, did they?—A. No. They respected the Blumenfeld patents in that territory.

Q. So they did not compete any longer with your companies in the territories that you had theretofore had competition from Laporte in; that is correct, isn't it? Commercial competition?—A. You mean on the Continent?

2930 Q. Yes.—A. Yes.

Q. You also mentioned this morning the creation of the Japanese company. That was in about 1935, was it?—A. Well, I don't remember the date, but probably somewhere around that time; 1935 or 1936. You have that in the agreements anyhow.

Q. Well, the titanium business was then developing rather rapidly in Titan's territories, wasn't it?—A. Yes.

Q. And the production of your plants was increasing considerably, was it not?—A. Yes. You have the statistics there. Yes.

Q. And Japan was in TG's territory?—A. Yes.

Q. And TG was serving the Japanese market at that time with products manufactured at Leverkusen?—A. At which time?

Q. 1935—A. Yes; before the Japanese company started operations?

Q. I am talking now about before.—A. This is the time afterwards.

Q. And Blumenfeld was also selling in the Japanese market, was he not?—A. Yes.

Q. And after the Japanese company was created and the Japanese factory in operation, no exports were made by either Titaa or Blumenfeld into that market, were they?—A. No, and we had difficulty enough in importing before that time.

2931 Q. But you did export too and you did sell in the Japanese market prior to the creation of the Japanese company, didn't you?

The COURT. So he testified, through the Doitsu Company.

Q. And one of the reasons for the creation of the Japanese company was to prevent the development of a titanium business in Japan which might export into the other Titan territories, was it not, Doctor?—A. I would not say that exactly is the case. It was more in the following way, that we wanted to erect a factory in Japan in order to maintain and keep that business. There was a certain discussion, and certain people thought the money you put in there would be lost, and then these people were consoled with the idea that it looked like an insurance against Japanese competition so if you did not get anything out of it otherwise we might have a sort of insurance against them.

Q. Insurance from importing by any other Japanese company that might develop into the Titan territories?—

A. Yes, but I would not say it was the purpose.

Q. I understand, but that was one of the reasons?

The COURT. It is a by-product?

The WITNESS. Yes.

The COURT. Whose territory was China in?

The WITNESS. That was Titangesellschaft.

2932 The COURT. And the Japanese development would threaten any market in China?

The WITNESS. Yes. That is right.

Q. So when all these Titan companies were created and the agreements made with the Blumenfeld companies that we have described and the price agreement with Laporte, the entire titanium production throughout the world, exclusive of the United States, was substantially under all

these agreements, is that correct, Doctor?—A. Outside the United States?

Q. Yes.—A. Yes.

Q. So that the only other producers not directly involved in any of these contracts were those in the United States, and any imports from any company in the United States that might be producing titanium pigments would have an immediate effect of breaking down these frontiers, as you called them, would they not, Doctor?—A. As far as that company?

Q. Yes.—A. But not as far as these companies which were exchanging technical information and making a technical exchange and cooperating together.

Q. To the extent that any such imports that might have come into those territories which had been allocated to the company, and the agreements which had been made within those territories, such imports might have 2933 interfered with the plan for regulating the markets in those territories? Is that not a fact?—A. No. I cannot say that. I do not follow that entirely why it should.

Q. In other words, you did not think any imports into say the territory in China by some company that was not in on this agreement—you would not be concerned about that, would you?—A. Not except as a competitor in any way.

Q. You would, however, if you saw or met that competition in any one of these territories, you would, of course, take immediate steps to prevent its recurrence if it came from any of your companies, wouldn't you?—A. I would try to regulate it in accordance with the agreement.

Q. And there were some occasions in which you did endeavor to trace imports which could not otherwise be accounted for into some of your exclusive territories?—A. There were some instances, some small ones, but not of much importance.

By the COURT:

Q. They were not important as quantity, but they were important in principle?—A. Yes; they were important particularly as far as psychology was concerned.

Q. You wanted to make sure that everybody was observing the territorial arrangements?—A. Yes—were 2934 loyal to the whole thing.

Q. What was the reputation of the Japanese courts? Did they respect foreign investments?—A. I

really do not know. But I do not think there was much reputation at all. But I really do not know.

By Mr. Dixon:

Q. You testified this morning, I believe, with reference to this Paris conference in March of 1931. That was between the Titan companies and the Blumenfeld companies? That is correct?—A. You mean that meeting in 1931?

Q. In March of 1931 in Paris.—A. Yes. That was the meeting I have been reading about and do not remember much about, but that was between the Blumenfeld and Titan companies, and I believe Ticknor and Chase were there, isn't that so?

Q. I was not there.—A. Pardon me, but I thought you might know.

The COURT. The questions go in the other direction.

Q. In any event, Doctor, at that meeting there was rather a complete discussion of the entire titanium situation in the world, wasn't there?—A. Yes, but let me first explain—

Q. Just a moment.

The COURT. He wants to explain, and I will let 2935 him.

A. (Continuing) But I have so little memory of the whole thing there, and practically I could not remember anything before I came over and saw these papers, so I am not talking from memory on this.

Q. I understand, Doctor, because we don't hold that against you, because this is a good many years ago. I hand you what has been marked Exhibit 208 for the plaintiff and ask you to examine that and state to the Court whether you prepared that report.

Mr. WEBSTER. He did not prepare the whole report.

Mr. DIXON. Yes. I am asking him now what he prepared.

A. Is this the report for 1931, March?

Q. Well, I presume it is, Doctor, yes.—A. Because I have seen one of these papers. I shall have to read through all this?

The COURT. No. Look at it and tell us whether you are the one who is the author of this document. The answer might be "Yes" or "No", or it might be "Yes" in part and "No" in part, or it might be "I cannot recollect." Those are the possibilities.

A. I will have to say I cannot recollect. When I saw this at one time I asked myself—I could not remember

it at all—when I came over it here recently when I
2936 was reading through this.

The COURT: Can you tell by examining the style of writing, whether it corresponds to the style you were accustomed to use at the time? Are there any expressions in it which would give you a clue?

The WITNESS. I might very well have done it. I won't deny, but I cannot confirm. I might very well have done it.

The COURT. Very well.

Q. I will hand you what has been marked Plaintiff's Exhibit 530 and ask you if you wrote that letter to Mr. McCarty enclosing with it the report of this conference I have just showed you?—A. I must read this letter.

Q. That is all right. Take your time, Doctor.—A. I think I remember the letter, but do you want me to read the whole thing?

The COURT. Are you the author of that letter?

The WITNESS. Yes. I recognize that.

Q. And attached with your letter did you send this report that I have just shown you of the conference in Paris that you referred to in this exhibit?—A. It is very likely, but I cannot say definitely Yes, but it is very likely.

The COURT. Is there a sentence in there to which you want to call the witness's attention?

2937 Mr. DIXON. Not particularly, Judge.

Q. Now in this conference in Paris on which you made this memorandum—

Mr. WEBSTER. Just a moment, your Honor. This Exhibit No. 208 is an exhibit consisting of a letter from Dr. Mayer to Mr. Burton, and then at the top a letter from Mr. Chase to Mr. Beschorman, to which are attached that report by Dr. Latka, which appears as Dr. Latka's report, and containing, I believe, in addition a memorandum on the inside which is referred to in the Chase letter as Dr. Jebesen's memorandum. So that even on its face it does not purport to be Dr. Jebesen's report, but Dr. Latka's report, together with—

The COURT. A memorandum by Dr. Jebesen?

Mr. WEBSTER. A memorandum which Mr. Chase says was written by Dr. Jebesen.

Mr. DIXON. I asked Dr. Jebesen whether he prepared that particular memorandum. I am not asking about Mr. Chase's memorandum.

The COURT. That is Exhibit 208. You mean thereby a memorandum attached to Exhibit 208?

Mr. DIXON. That is right. The reason for that is, in the interest of avoiding duplication of memoranda it was not attached or printed with the other exhibit. That is all.

2938 The COURT. Very well. You would not contradict that the memorandum was written by you and so appears on the face of the document?

The WITNESS. No, but I cannot say.

The COURT. I say you would not deny?

The WITNESS. No. I cannot deny.

Mr. WEBSTER. All I wanted to make clear on the record was that all Mr. Dixon showed him was that part.

Mr. DIXON. That is all I asked about. The record shows that.

The COURT. The record may not have shown to which page your finger pointed, so we now understand the memorandum therein referred to as being the memorandum authored by the witness.

Q. And on page 2 of this memorandum that you made under paragraph (a) we find a reference as follows:

"It is presumed that an agreement will be reached between the Commercial Solvents Co. and the Titanium Pigment Co. regarding a cooperation within their territory of such a nature that an exchange of licenses and experience can take place between all the companies concerned."

Do you recall whether that was discussed also at this meeting in Paris, Doctor, in 1931?—A. I do not recall

that but, as I said, I do not recall that meeting 2939 at all.

Q. You have completely forgotten about it now? You have completely forgotten about this Paris conference in March of 1931?—A. I have said it repeatedly, and also previous to somebody else here, that that memorandum of that conference I have no memory of except I remember I had a talk with Mr. Mayer and Dr. Kuhné at that time in Paris, but the whole conference—it has escaped my memory. I won't say that that means that it did not take place. That is an entirely different thing.

The COURT. Manifestly it took place and you are not disowning the paper?

The WITNESS. I do not say neither yes nor no because frankly, I am sorry, but I cannot help it. I may mention that Ticknor and Chase made a lot of representations at various times.

Q. Well, do you remember they were present at this meeting? They were the head of, or at least connected

with, Commercial Pigments Company in the United States. You knew that, didn't you?—A. Yes.

Q. When was the first time that you saw Mr. Ticknor or Mr. Chase, if you recall?—A. That I do not dare to say. I did not meet Ticknor much at all. I met Chase once or twice. I met Ticknor once in London together with Chase.

Q. When was that?—A. That was in 1933. That 2940 is the time Mr. Ewing of the du Pont Company was there.

Q. You mean 1931, not 1933?—A. No, I think that was 1933.

Q. Was that the time that you had a luncheon with Mr. Ticknor and Mr. Chase and Mr. Ewing and Mr. Burton?—A. Yes.

Q. And Mr. Beschorman?—A. Yes.

Q. I will hand you what has been marked Plaintiff's Exhibit 200 and ask you to examine it and state to the Court whether that is one of your letters, or a photostat of one of your letters (handing)?—A. That is right.

Q. Will you read that and state whether that refreshes your recollection as to when that meeting was held and what occurred at that meeting?

Mr. WHITNEY. What is the date of that letter?

Mr. DIXON. September 11, 1931.

A. Yes. That must have been in September 1931. You are right. It appears from the letter and it is perfectly true. Was not Beschorman there too?

Q. Yes. Beschorman was there. And according to your letter, Plaintiff's Exhibit 200, Mr. Ticknor and Mr. Chase explained that the combination with du Pont would in no way impair the plans of a coming together of their and our group—it would rather further the matter." Do you recall that?—A. Yes.

2941 Q. And that was in fact stated to you by Mr. Ticknor and Mr. Chase at that time when you wrote this letter, was it, Doctor?—A. Yes.

Mr. WHITNEY. You remember that?

The WITNESS. Yes. I remember that.

Q. That was after the du Pont Company had taken over or acquired Commercial Pigments Company, was it?—A. That I do not know, but I suppose that was the case.

The COURT. That was after Krebs had taken over Commercial?

The WITNESS. And I believe it was stated at that time—I have asked Mr. Ticknor at that time whether he was

afraid of du Pont being more interested in lithopone than titanium or something on that line.

Q. And after that meeting in September of 1931 there was an informal price arrangement made between the Blumenfeld companies and the Titan companies in Europe for the time being, do you recall?—A. Not as a consequence of that meeting.

Q. Do you recall whether Dr. Blumenfeld stated to you that he would go along or wait until something was worked out in the United States before proceeding further with any negotiations in Europe?—A. I do not recall it but I wrote very extensive letters, so I suppose you can find it in the letter itself, what happened at that time. I 2942 sent photographs over here, so to say, about what happened.

The COURT. You mean photographic reports?

The WITNESS. Yes. I mean they are fairly long, those reports, and I do not think much happened which was not in the reports.

The COURT. There has been some comment about that, not uncomplimentary.

The WITNESS. Yes.

Q. I will hand you this Exhibit 200 again and ask you to read it and state whether that refreshes your recollection as to whether you had any conversations with Mr. Blumenfeld about September of 1931 about further arrangements in Europe?—A. Well, here you have it stated: (Reading)

"Mr. Blumenfeld here in Paris has told me that he was informed by Mr. Ticknor and Mr. Chase of the situation in New York, and that du Pont would continue the conversations with National Lead Company. He was willing to wait; he was, however, in a difficult position as he could sell more than he could produce."

Q. Does that refresh your recollection now, Doctor, as to whether Dr. Blumenfeld said he would await the outcome?—A. I mean what is stated here is correct. That is perfectly true.

2943 Mr. WHITNEY. Your Honor, Mr. Dixon introduced this entire file of Dr. Jebesen's letters and nobody questioned that they were truthful as written, in the sense that they reflected what Dr. Jebesen then thought. Now nobody claimed that he was then prevaricating and there is therefore no function to cross examine insofar as it points to Dr. Jebesen or as to reading to Dr. Jebesen what he then wrote and asking him

to say that he was not then telling a falsehood, and that is all that Mr. Dixon is doing now. He could do it for a week and thereby, in effect, be summing up from the letters, but insofar as it is confined to that I hope it is to that only.

The Court. Very well, you need not object, but I will instruct Mr. Dixon that corroboration is unnecessary in this instance since it is true that none of the letters have been challenged; and that the cross examination, if any, should be directed towards filling in gaps or supplying mental reservations which you think may lie behind some of the communications, and matters of that kind, but the mere reassertion of the facts which are reported in these letters will get us no place, for this reason: The matter is of great antiquity, and as between Dr. Jebesen's present recollection and what he reported in the letters I will always take the letter in preference to his present recollection even if he were to contradict his letter.

Mr. Dixon. If I may interrupt, your Honor,
2944 I hasten to assure the Court that I have no intention of going over these letters for that purpose.

The Court. Very well.

Mr. Dixon. I have only referred to two or three of the documents, but so that it may be clear I have no intention of going through all, and then only very briefly.

The Court. Very well.

By Mr. Dixon:

Q. Now, Doctor, the 1920 contract, Article XIV, prevented any license to any company within the territory allocated to a company like Titanium Pigment without the licensee assuming the obligations of the contract of 1920? That is correct, is it?—A. You mean prevented to give licenses or give sub-licenses?

Q. Yes, without the consent of all the other parties to the contract.—A. It is clearly stated in the agreement, with certain limitations which I do not think it is necessary to go into here.

Q. That is right; and no approval of such a license was necessary if the licensee assumed all of the obligations of the 1920 contract in that territory? That is true, isn't it?—A. Yes.

Q. Now you mentioned this morning that you were not directly involved in the negotiation of this contract between Titanium Pigment Company and Krebs; that
2945 is true, isn't it?—A. Yes, and I think—

Q. In the first— A. —not the negotiations between those two companies.

Q. And when was the first time that you had any notice from Titanium Pigment Company that they were contemplating the making of such a license agreement with Krebs Pigment & Color Corporation?—A. When I was over here in 1932, I think it was, I knew that negotiations with du Pont and Dr. Thompson were had, certain conversations, but I never discussed the thing with Dr. Thompson at that time.

Q. Did he discuss it with you?—A. No.

Q. Did he say anything to you about any proposal to exchange licenses with Krebs and Titanium Pigment Company at that time?—A. We did not discuss it at all.

Q. What was the occasion then for your being notified of such negotiations, if you recall?—A. Well, I don't think you should call it "notified." I was here and I heard about it.

Q. You do not know who you heard about it from?—A. No.

Q. And did you ask any questions at that time of whoever told you about it, about the negotiations?—A. No.

Q. And when was the next time—

The COURT. I take it your relations were—who was the vice-president in charge then, the executive vice-president?

2946 The WITNESS. Mr. McCarty, who was my very good friend.

The COURT. Was still in charge?

The WITNESS. Was still in charge. He was ill. He was sick very much, but he happened to be in New York some time when I was over and he asked, "How are these things getting on?" And I said, "I have heard that Thompson is negotiating or talking with du Pont," but that was all. Thompson I had very little contact with.

Q. Do you recall the next time that you heard about such negotiations?—A. I heard no more. The next time was the letter which Dr. Thompson wrote me; a letter in January, I think it was, 1933; where he sent some memorandums, I think it was, about certain understanding he had reached with the du Pont Company about making an agreement and he sent them over and wanted my reaction and the European associates' reaction to it.

Q. And what was your reaction to those memoranda?—A. A very strong one.

Q. In other words, can you state to the Court whether

you were in accord with the proposed agreement with Krebs as submitted to you at that time by Dr. Thompson?

—A. I wrote back and pointed out very strongly, as strong as I could, the radical deviations which I considered this proposal represented, deviations from the principles of the 1920 agreement.

The COURT. You were very much disturbed about it?

The WITNESS. I was shocked.

The COURT. You were afraid that might cause the whole structure to topple?

The WITNESS. Yes. I could not understand how at that time National Lead Company could contemplate—

The COURT. Doing any such thing?

The WITNESS. Doing any such thing. I was shocked at that time.

Q. So you did not approve of that proposal as submitted to you by Dr. Thompson?—A. No. I think you have got it on the record here too.

Q. That is right. And did Mr. Beschorman then come over to talk to you about this agreement?—A. He came over I think in May. I did not get any answer from Thompson. But he came over in May and at that time he had, as far as I remember, he had with him the full draft of the agreement which Thompson had not sent. He had sent certain principles and so on, and when Beschorman took it up with me in Paris I presented to him the same arguments as I had presented to Thompson, not so extensively, but shorter, and he just got up, very, very impatiently saying, "But we have got to sell this agreement."

I think I stated this yesterday.

2947a Q. Did you inquire of Mr. Beschorman as to what he meant when he said "We have got to sell them this agreement"?—A. No. Except my impression was that he wanted to have it done.

Q. Did he give you any reason as to why it had to be sold, as he called it?—A. No.

Q. And did you ask him for any reason why it had to be sold?—A. It would not have led to anything. He was not the type of man who would have answered that, anyhow, as far as our relations were at that time.

Q. So you did not receive any satisfaction from Mr. Beschorman at that time?—A. No.

Q. And was the matter discussed with the German people in Titangesellschaft at that time?—A. We left together, Beschorman and I, for Cologne, very shortly after his arrival in Paris, and met there Dr. Kuhne and Dr.

Raspe, I suppose—yes, Dr. Raspe was there who was the manager of the factory and Beschorman presented his draft to Kuhne and wanted his approval of it. I don't remember much what he, Beschorman, said at that time, if anything, but I remember very well that Kuhne just gave a courteous answer that he felt sure that this would be—that the interest of Titangesellschaft would be taken care of and then he said he wanted now to leave it to the legal department to study it.

2948 Q. The Germans were very particular you said, I believe, about being exact and formal in such matters, is that right, Doctor?—A. Oh, yes, generally so.

Q. And so Mr. Beschorman did not sell the agreement, to use that word that you used, to Dr. Kuhne when he went to Europe in April of 1933, is that correct?—A. I think so. He sent back a courteous answer, non-committal.

Q. And you discussed the agreement with him thereafter, when they had the TG officials there, didn't you?—A. I don't think you mean the TG officials.

Q. The I.G.—A. I discussed it up in Frankfort, where they had several lawyers, and Mr. Weber Andreae was there and Mr. Kuhne was there. You can find it described in one of my letters.

Q. It was a matter of considerable discussion at the meeting in Frankfort, was it not, between yourself and the I.G. officials?—A. They had got a shock when they had read it. The discussion was not very long because I told them that what they had said I had already said or written to the National Lead Company, so I said to—it was several months apart, and then Beschorman came with this proposal which I thought showed that National Lead Company could not get any further with du Pont. I told him then, "So you will have here to make up your mind whether you will approve it or not."

2949 They asked specifically, "Isn't this agreement already signed?" and I said, "no, the signature is waiting until we hear from you about it," and then they got together and drafted a letter stating what they considered the most important principles for the 1920 agreement, addressed to me, and it was sent over to New York.

The Court. Is that the letter in which they named certain conditions upon which they would approve?

The Witness. Yes.

Q. From the letter that you transmitted to Mr. Beschorman, from I.G., after these conferences, there was

not any doubt in your mind, was there, Doctor, that they were insisting that the territorial limitations, or the exclusive territories allocated to TG under the 1927 contract with Titan A/S be respected if they were to approve the agreement? That is a fact, isn't it?—A. That is what they wanted to be fixed now.

Q. And that was the condition that they imposed to the granting of any consent or approval by TG of the proposed Krebs-Titanium Pigment agreement; wasn't it?

Mr. WHITNEY. Just a moment, Mr. Dixon. I never minded any examination as to what anybody said or wrote. I was a little reluctant about "what was in your mind;" but the generality "that that was the condition imposed" caused me to rise.

2950 The COURT. Objection sustained. You need not answer.

Q. Now did you state to the I.G. officials at the Frankfort meeting of June 1933, that you expected to go to the United States in July of 1933?—A. That I do not remember, whether I said in July, but that I was likely to go over sometime that summer, yes. I used to go practically every year to New York.

Q. Had you been discussing the Aussig and these other agreements with Mr. Blumenfeld just about the same time?—A. We had a short discussion, if I remember right, in Paris, somewhere between the meeting in Frankfort and when I left for New York.

Q. Well, was there any particular reason for your coming over to New York in July of 1933, other than to make an annual visit?—A. Well, naturally, I felt very much interested in having a talk with the people in New York about this whole matter. After all, you have all these letters and I had practically no discussion with Beschorman, and I was anxious to get over and find out a little where the land was lying.

Q. In other words, it was quite a responsibility on your shoulders as manager of the Titan companies, as to whether or not such a contract would be any deviation of the 1920 contract, wasn't it?—A. Yes, not the responsibility, but I was very interested.

2951 Q. So you were naturally anxious to discuss this matter firsthand, is that correct?—A. Yes.

Q. With the people in New York. That was one of the reasons for your coming over in July of 1933, wasn't it?
A. Yes.

Q. And you did have such discussions, didn't you?—A. Very little, and I will tell you why: when I took it up with Dr. Thompson I did not get anywhere. I could not get him. He got a headache.

Q. Who was superior, Thompson or Beschorman?—A. Beschorman was my superior. Thompson was the head of the research laboratory over here. He was really not a business man, but he mixed into business and took part in these negotiations.

Q. Mr. Beschorman was head of the Titanium Pigment Division of National Lead at this time, wasn't he?—A. Yes.

Mr. WHITNEY. Won't you kindly permit him to complete his answer. "I will tell you why."

Mr. DIXON. Just a moment, this is my examination.

The COURT. All right. We will get around to it.

Mr. WHITNEY. It was his inquiry that stopped in the middle of a sentence, but now may we go back to the sentence?

2952 The WITNESS. Shall I continue?

Mr. DIXON. He said Dr. Thompson got a headache.

The WITNESS (Continuing). And he was old; and rather—he was not very strong. Mr. Beschorman I did not get anywhere with as I told you. Mr. Cornish had recently had a stroke, so in the company there was practically nobody to talk with except Beschorman and Thompson. Carter, who became president after Cornish was there, but did not take much interest in these matters at all and was not informed about them, so I felt entirely lost at that time when I came over.

Q. Did you have any trouble talking with Mr. Beschorman about this matter?—A. Oh, yes. He was not a man easy to talk to.

The COURT. That is what I meant when I said your relations were not of the same quality as they were with Mr. McCarty.

The WITNESS. Very much different.

Q. Did you have any discussion at all with Mr. Beschorman about this proposed agreement?—A. He generally said to me, "Don't go into detail, Dr. Jebson. You are too far a man for details," and that was the way he tried to get around it.

Q. You were a stockholder in Titan Co., Inc., weren't you?—A. Yes, and I felt very decisive about it.

2953 Q. And naturally you would therefore have a personal interest in this agreement, or proposed agreement?—A. Yes, I had, but at the same time I was an employee of the National Lead Company, paid by the National Lead Company for taking care of their interests, and to me it was a matter of choice, and I thought my own interests will have to stand behind the National Lead Company's, because I was their man in Europe.

Q. Did either Mr. Carter or Mr. Beschorman or Dr. Thompson tell you that you had to approve this agreement?—A. Well, that is a strong word, but Beschorman tried to use the pressure they could on me for approving it.

Q. Well, was this a matter for you alone, Dr. Jølsen, to approve this proposed agreement?—A. For me alone?

Q. Yes.—A. No. I was really what—alone? After all it was dependent on the Germans first of all.

Q. Yes. In other words this agreement could not be made unless it was approved by TG, could it, under the 1920 contract?—A. Yes, or by I.G.

Q. Yes, or by I.G. either, so this was not a matter of you doing personally what National Lead ordered or told you to do, was it, Doctor?—A. I could not act for the I.G. in this matter at all.

Q. I understand. Did you have many conferences with Mr. Beschorman about this proposed agreement
2954 when you were here in July of 1933?—A. We talked about it. Or I talked about it. He did not talk much about it. He just tried to waive it aside.

Q. Didn't he ask you what can be done to get the approval of I.G. to this agreement?

Mr. WEBSTER. May I object to that as the witness has answered this question several times.

The COURT. Yes. I was reflecting in my mind the point at which I should intrude. I will let him go just a little further.

Q. (Question read.)—A. The agreement was presented to me as being the result of long discussions between du Pont and the National Lead Company, and it had been developed and was well considered by them. They thought that it was of interest to the National Lead Company to have that agreement made, and there was no time for redrafting the language, or I would not say time, but they were not inclined to redraft or change it.

Mr. DIXON. I am wondering if I can get an answer.

The COURT. I think that is all right.

Mr. Dixon. I would like, if possible—

The Court. All right. Reframe another question and we will sharpen down the issue.

The question was whether Beschorman asked him whether something could be done to persuade the
2955 Germans to go along. Is this about the size of it? That Beschorman put such a question to you?

The Witness. No. He just left me confused.

The Court. Because he had that letter from the Germans specifying the five conditions at that time?

The Witness. Yes.

Q. Did Mr. Beschorman introduce you to Mr. Rupprecht?—A. Yes, and it led to having a talk with Mr. Rupprecht.

Q. Had you met Mr. Rupprecht before this July meeting?—A. No.

Q. That was the first time you had met him?—A. Yes.

2956 Q. And where did you meet him, if you recall?—

A. In Beschorman's office.

Q. What was the subject of discussion between you and Mr. Beschorman and Mr. Rupprecht in Mr. Beschorman's office?—A. I was trying to get Beschorman to get Rupprecht to see the difficulties we were encountering with regard to the IG.

— By the Court:

Q. Let us stop going around in circles, Doctor. You wanted to persuade Rupprecht to go along on the territorial arrangement?—A. Yes.

Q. And on the technical exchange?—A. Yes. To accept those principles.

Q. To accept the principle of territorial limitation and technical exchange?—A. To get as far as I could to accept the 1920 agreement.

Q. As far as you could go in persuading him?—A. Yes.

Q. That was the object of your visit?—A. That was the object of my talk.

Q. You tried to sell that kind of proposal to Mr. Rupprecht?—A. Yes.

By Mr. Dixon:

Q. What did Mr. Rupprecht say to you at that time with reference to respecting the territories of the Titan associates?—A. He had too many answers in one
2957 way. One moment he talked about the executive committee, they would not accept that kind of

thing. At another moment he said, "You are secured against any invasion from us through your patents," and so on. At the third time he said, "For legal reasons."

Now, with regard to legal reasons, as was said in those letters, I couldn't take that serious. With regard to the other things, I found it very difficult to take those serious too; but at the same time my impression was that he had a desire of trying to fall in in some way, so—

The COURT. You mean accommodate you?

The WITNESS. Accommodate, yes.

A. (Continuing) And he was trying to paint a picture in that direction, that there wasn't anything to be feared. But I didn't get, what I would say, down from sound to things, to get down to some definite undertaking. So, to me of course the question was in sending these letters back, what shall I say? I mean, to the Germans. I felt on the one side I had to be, as you said (addressing the Court) a good soldier, and at the same time I thought this may work out all right when the time comes. So I just wrote a few words to Kuhne and Weber-Andrae trying to transfer that opinion, convey that opinion.

Q. Well, how many conversations did you have with Mr. Rupperecht?—A. Only one.

2958 Q. Just the one conversation?—A. Yes.

Q. About how long was it, do you recall?—A. The conversation?

Q. Yes; in time.—A. It may have been an hour, it may have been two hours; I can't say; if it was in the morning or afternoon, I really don't remember.

Q. You don't recall precisely what Mr. Rupperecht said,—I mean the exact language,—about respecting the territories?—A. No. That is too long a time ago.

Q. But when you left that meeting, Doctor, were you satisfied by what Mr. Rupperecht had said to you that he would see that Krebs would respect the territories of the Titan companies if this agreement were made?

Mr. WHITNEY. Objection. It is a state of mind.

The COURT. Objection sustained. You can give him the first part of your question.

Q. (Record read as follows: "Q.—But when you left that meeting, Doctor, were you satisfied by what Mr. Rupperecht had said to you?")

A. No. It depends upon in what respect you mean. If you mean satisfied, that I felt happy about the thing, no.

By the COURT:

Q. In what respect were you satisfied?—A. Well, I was satisfied to that extent that I believed—he had been able to sell himself to some extent—I believed that there might work out something as he called eminently satisfactory.

Q. In other words, you did not really anticipate any further trouble?—A. No; or, rather, I was hoping that as time developed I might be able to get him to understand and sooner or later fall in line.

Q. And go a little further?—A. Yes. But in other words, it was a matter to me of further development. I was dealing with a situation where my impression was that Beschorman did not really understand this agreement either, I mean the 1920 agreement, or the consequence of it. I say, as I said, I felt I was lost practically at that time.

By Mr. Dixon:

Q. One of the things on which you were not satisfied was the exchange of licenses, wasn't it, Doctor?—A. I wanted exclusive licenses and he didn't give that. He wanted only these exclusive except himself.

Q. That was to be made a matter of negotiation, wasn't it?—A. Yes.

Q. Did you have any discussion with him about whether those licenses, when negotiated would, be exclusive for your European company?—A. Nothing further than what was written in that letter.

Q. And on what other point, if any, were you not satisfied when you left that meeting with Mr.

Rupprecht?—A. When you have been trying to get him to fall in line with the 1920 agreement and the result is what it was there, then take just the difference between those two. I can't remember in detail what it was.

Q. Of course we understand that he did not subscribe to all the provisions of the 1920 agreement, Doctor.—A. Pardon me?

Q. He did not subscribe—A. No.

Q. —to all of the provisions of the 1920 agreement in the sense that you made a written contract with him. Now, you discussed with him, did you not, at this meeting the things that you wanted to be assured of if you were to inform your foreign associates that they could safely approve this agreement?—A. I don't—isn't this the same as your question?

Q. No.—A. I don't get the point in your question.

The COURT. That is an answer. He says he doesn't understand it.

Mr. DIXON. Would you read the question?

Q. (Read as follows: "Now, you discussed with him, did you not, at this meeting the things that you wanted to be assured of if you were to inform your foreign associates that they could safely approve this agreement?")

2961 —A. It was discussed, but whether it went so far as to say if I were to inform the foreign associates whether they could safely approve this agreement, I don't think I looked upon it exactly from that point of view. After all, I didn't have the responsibility for the Germans to that extent.

Q. Well, of course, the Germans didn't get all they wanted in the letter that they sent, did they?—A. No, but I was not a representative of the Germans.

Q. Were you satisfied when you left the meeting with respect to the action of Krebs in respecting the territorial limits of the Titan companies?—A. I was hoping—

Mr. WHITNEY. Your Honor, I had an objection to your Honor's question but I let it go because your Honor asked it.

The COURT. No. You should not do that. I will sustain your objection.

Mr. WHITNEY. I am glad I did, because I felt this witness was strong enough, unlike another witness, not to feel that he ought to respond to the Court, if you know what I mean, so I thought I would not object, and he respondent in the way that your Honor may recall or will check in the record.

I do object to Mr. Dixon now asking him the same line of questioning, of pressing further what was in his mind.

2962 The COURT. Objection sustained.

Q. You have been reading the transcript of course of the trial every day, Doctor?—A. Not fully, not entirely. Certain days I did not get so far as to do it.

The COURT. Do you feel strong enough to stand up under that?

The WITNESS. Frankly, I had something else to do also which had to be done, and I couldn't—I felt as if my mind got stale after a little, when you are reading.

Q. Were you in the room all the time, Doctor, when Mr. Beschorman and Mr. Rupprecht were together?—A. That

I don't remember, but I don't believe so. I think that Rupprecht probably arrived and then I was called in, and how long he may have been there beforehand I don't know. Maybe I left also before Rupprecht left; I can't say.

Q. Did Mr. Beschorman ever say anything to you after this meeting that you have described with reference to anything that Mr. Rupprecht may have said to him about the request of the German company as set forth in the letter?—A. No, nothing particular.

Q. Do you recall when this meeting was held with Mr. Beschorman, I mean the approximate time, in July?—A. I think it must have been in the latter part of July. It was very hot, I remember.

Q. Was it before or after Mr. Rupprecht wrote 2963 the letter to Mr. Beschorman?—A. It was after that.

Q. When was the first time that you saw that letter from Mr. Rupprecht to Mr. Beschorman?—A. Beschorman showed it to me.

The COURT. Wait a minute. I want to be sure I understand this. The visit between Dr. Jebson and Mr. Rupprecht you say was after the letter of reassurance?

Mr. DIXON. Yes.

The COURT. All right.

Q. And did he show it to you in the meeting that you had with Mr. Rupprecht?—A. I don't think so.

Q. Did he show it to you before you discussed the subject with Mr. Rupprecht at this meeting?—A. Of course my memory isn't very strong on those matters, but I believe he showed it to me before Rupprecht came. That would have been the natural thing to do.

Q. What if anything did he say about that letter to you that Mr. Rupprecht had written to him?

Mr. DIXON. On June 28th, your Honor.

The COURT. Will you pause a moment? Is this the letter which was intended as the transmittal to the Germans that we are talking about?

Mr. DIXON. Yes.

The WITNESS. I understand it is the letter from Rupprecht to Beschorman, isn't it, in answer to the IG's?

2964 The COURT. The letter subsequently transmitted to the TG or IG.

The WITNESS. Yes.

The COURT. All right. Now you may re-read that question.

Q. (Last question read.)—A. I don't remember now, but if I should try to recall, or in trying to recall, I think what he said was, it would be a very short comment on the things, in that he had been trying and didn't get any further.

Q. Did he say anything to you about how he managed to get that letter from Mr. Rupprecht?—A. No, I don't remember.

Q. But you did see that letter before you went into this conference with Mr. Rupprecht and Mr. Beschorman, you are certain of that?—A. Yes, I am fairly certain.

Q. Did you discuss that letter with Mr. Rupprecht?—A. I don't think we had the letter for this particular discussion. What I was trying was to get Rupprecht to see and understand the situation in Europe and with regard—in other words, the 1920 agreement. That was my concern. It was the same with regard to Beschorman himself.

Q. What had Mr. Beschorman said, if anything, to you about this letter from Mr. Rupprecht dated June 28, 1933?

—A. I don't think he commented upon it in any other way than when I was talking about this he said, "Don't bother, Dr. Jebsen, you are talking too much of the details."

Q. And everything will work out all right?—A. Well, I don't remember whether he said that, but evidently he wanted me to have that impression.

The COURT. Did he say to you that du Pont was a high-class, reliable concern?

The WITNESS. No, I don't think he said that. But I don't think it was necessary either. I knew du Pont's reputation.

The COURT. We will take a short recess.

(Short recess.)

By Mr. DIXON:

Q. I believe you testified, Doctor, that in your conversations with Mr. Rupprecht and Mr. Beschorman you were endeavoring to get Mr. Rupprecht to understand the conditions in Europe about the 1920 agreement; that is correct, isn't it?—A. The principles of the 1920 agreement.

Q. And did Mr. Rupprecht indicate to you that he understood those conditions?—A. Well, he was always very evasive.

Q. Well, were you satisfied that he understood?—A. No.

Q. Now, what conditions of the 1920 agreement did you think he did not understand?

2966 Mr. WHITNEY. Well now, your Honor, I object to that. The original question was objectionable. One is enough.

The COURT. Objection sustained.

Q. I will hand you what purports to be a copy of a letter dated July 12th from Mr. Beschorman to the IG Company and ask you to examine the same and state to the Court whether you ever saw that letter before.

Mr. WEBSTER. The exhibit number is what?

Mr. DIXON. 273; it is in that group.

A. I think I have seen the letter before; but do you want me to read it through?

Q. That is what I am asking you, did you ever see it before?—A. Yes.

The COURT. That is all you have to do. He has seen this letter.

A. (Continuing) Let me refresh my memory a little bit. (Witness refers to letter). I did not want to take up your time. Excuse me.

Q. Did Mr. Beschorman show you that letter, do you recall?—A. I think he handed it to me. I think I was the one who sent it over, didn't I? I think you will find it somewhere.

Q. Do you recall whether he handed it to you before or after you talked with Mr. Rupprecht?—A. No, that

2967 I can't recall exactly. If you will let me read it I may be able to find out.

Q. Yes (handing exhibit).—A. No, I can't say exactly whether it was before or after.

The COURT. Can you tell from the date?

The WITNESS. This is July 12th, this letter; but when I saw Rupprecht, I don't remember exactly the date.

The COURT. Is there anything to refresh the witness's recollection as to the date of the Rupprecht meeting?

Mr. DIXON. We have never been able to set that date, your Honor, specifically, and for that reason there is nothing in the file from which we are able to refresh his recollection on the date of such meeting.

Q. In any event that letter of July 12th to IG by Mr. Beschorman was shown to you by Mr. Beschorman; that is correct, isn't it?—A. Yes. And I think you will find that I have been the one to send it over to IG.

Q. Yes. I was coming to that. And on July 21, 1933, you forwarded that letter to the IG Company, did you not?—A. I think it was July 21st; I am not certain about that. Yes.

Q. And with the forwarding of that letter of Mr. Beschorman, to which was also a copy of Mr. Rupprecht's letter of June 28th, you also wrote a letter yourself, did you not?—A. Yes.

Q. And you also wrote one to Weber Andreae, did you not?—A. Yes.

Q. And with those two letters, namely, the one to IG and to Weber Andreae, you enclosed the letter from Mr. Beschorman of July 12th and Mr. Rupprecht's letter of June 28th, did you not?—A. It looks like it here. "I beg to enclose and send you a letter addressed to I.G. Farbenindustrie with enclosures," so they were copies, evidently.

Q. Yes. You are quite familiar with those letters, aren't you?—A. Yes.

2969 Q. You have seen them recently, even, haven't you?—A. Yes.

Q. And with the letter to Weber Andreae you indicated that the views expressed in Mr. Beschorman's letter of July 12th had been expressed also to you; that is correct, isn't it?—A. Yes, you have got it here, "Considering the views and interpretations as expressed by Beschorman, and by Mr. Rupprecht in his letter to Mr. Beschorman, it seems to me that a collaboration can be looked to which will be of important benefit to Titan-Gesellschaft."

By the Court:

Q. Is there anything in that letter which would help you establish whether the letter of July 12th, Mr. Beschorman's letter, was written before or after your meeting with Mr. Rupprecht? Can you tell from the tense of the verb you used in that letter?—A. No. This letter was evidently written after I had a meeting with Rupprecht—

Q. Yes, but you refer to meeting Rupprecht in your letter.—A. Yes. "I have met Mr. Rupprecht, president of Krebs Pigment & Color Corporation."

Q. Go ahead. What else does it say?—A. "who verbally has expressed to me the same views as to the future cooperation which has been expressed by Mr. Beschorman."

Q. You use the words "has expressed to me" in both cases,— "verbally has expressed to me the same
2970 views as to the future cooperation which has been expressed by Mr. Beschorman."

Q. Do you recall now whether in what year was that in?—A. Pardon me?

Q. What year was this? What year is the date of that letter?—A. 1933.

Q. Do you know whether in 1933 you had a sufficient command of the English language so that you knew the difference between "had expressed" and "have expressed," or would you say that that was a nuance you hadn't yet mastered?—A. I wonder if I master that today or "I have expressed" or "did express."

The COURT. All right, we cannot get any light from that.

By Mr. DIXON:

Q. Now, handing you again this letter of July 12t from Mr. Beschorman to I.G., will you examine it and state to the Court whether the substance of that letter was stated to you by Mr. Rupprecht when you had this oral conversation with him, as indicated in your letter to Weber Andreae, on July 21?

Mr. WEBSTER. Your Honor, doesn't the letter speak for itself?

The COURT. No. That is a perfectly pertinent question. I will explain to you after the witness has answered, if you want me to explain to you why.

2971 But I should think that a present explanation might be interfering with cross examining counsel.

Mr. WEBSTER. By then I think it would be of no advantage to me, you Honor.

Mr. WHITNEY. Your Honor, might I suggest a middle ground, that he read it and then lay it aside and answer in his own way what Rupprecht said?

The COURT. He is reading the letter for the purpose of answering the question whether or not in substance that is what Mr. Rupprecht said to him. That is the object of the question.

Mr. WHITNEY. The whole question would be how he interprets the word "substance." The letter is not susceptible of representing a man's memory of a substance of oral expression, and I would submit to your Honor that it can be given to him to refresh his recollection, then he can lay it aside and then, independently, having had his recollection thus refreshed—I am trying to have enough command of English to say "having had" correctly, I think it is important here—then lay it aside and give your Honor the substance of his recollection.

The COURT. I have no objection to that course in your time, but this is now Mr. Dixon's time, and

2972 there is nothing improper in the course he is pursuing.

Mr. WHITNEY. May I make it clear to your Honor? Here is a letter of a page and a half long, written by another man. And I most respectfully object to a question asking whether that page and a half correctly reflects the substance of the conversation had twelve years ago, of which it does not purport to be a record but it is an independent letter.

The COURT. I will overrule your objection and reserve explanation until after the answer has been given.

Mr. WHITNEY. I respectfully exempt.

A. It is very difficult to remember.

The COURT. Let me reframe the question, if you don't mind, because I think it may call for a more precise answer than the way it is now framed, with Mr. Dixon's permission.

Mr. DIXON. That is entirely all right, your Honor.

The COURT. Are the views attributed to Mr. Rupprecht in that letter the same as the views which were expressed to you by Mr. Rupprecht at the meeting you had with him?

The WITNESS. It is difficult to say, because Rupprecht was a man you could never pin down to anything. When you say that, your Honor, I am wondering whether
2973 or not this letter was written after the talk with Rupprecht?

Mr. WHITNEY. Does your Honor bear in mind that the name Rupprecht does not appear in this letter?

The COURT. I am not aware of anything.

Mr. WHITNEY. I am only suggesting it because it is true.

The COURT. When I say Rupprecht, I mean du Pont—

Mr. WHITNEY. It makes your question difficult.

The COURT. Du Pont/Krebs/Rupprecht.

The WITNESS. After all, it is an immense difficulty to recall what happened at the meeting in 1933.

Mr. WHITNEY. Of course with a man of Mr. Beschorman's character, as described here, you can't slant line as quickly as we lawyers do.

The COURT. Let me put the question to you this way, still with Mr. Dixon's consent, and you object to it.

Mr. DIXON. Not at all, your Honor. Not at all.

The COURT. I always mean that in a genuine sense.

By the COURT:

Q. After your meeting with Mr. Rupprecht, if your assistant, a hypothetical assistant, attending that meeting, had prepared Mr. Beschorman's letter as a draft of a

communication to be sent by you to the I.G., would
2974 you have felt, or do you feel, that such a draft
would have accurately portrayed the results of your
conference?—A. Again it demands for an exact memory
as to what happened in that meeting.

Q. Of course, there were a certain number of important
principles that you came there to discuss, and it is with
reference to those important principles that I would like
you to focus your mind and tell us whether your impres-
sion, and at best we can now have no more than an
impression of what occurred in that year, corresponds
to the impression conveyed to the I.G. by the text of Mr.
Beschorman's communication.

Mr. WEBSTER. Your Honor, I am not objecting in any
way to your Honor's question, but I respectfully suggest
that that question, in more accurate form than questions
that Mr. Dixon has asked with reference to the text of
a letter written at that time, does raise the question of
subtleties of language and expression which renders the
question susceptible of unfair use in the case of Dr. Jeb-
sen, who, confessedly, has not mastered the shading of
the English tongue.

Now I am not objecting to the question, but I am just
casting a shadow on the value of the question as a means
of getting at the truth.

Mr. WHITNEY. Your Honor, I hope with equal
2975 respect—I really mean that, your Honor, I re-
spectfully diverge from Mr. Webster because I do
object. Your Honor has asked for an impression in his
own mind and the impression on I. G.'s mind, and I really
think that is not relevant to the issues anyway. The
question is, what did Rupprecht say on behalf of du Pont?

The COURT. Of course we cannot get any longer a pre-
cise recollection from this witness as to what Mr. Rup-
precht said, so we have to go to the next best thing, which
is to get the substance of Mr. Rupprecht's communica-
tion. Well, we have to go to the next best thing, which
is the substance of Mr. Rupprecht's communication. Well,
we haven't got that very clearly because the witness's
memory is naturally vague on the subject. But here we
have a communication by a stranger with respect to whom
this witness has written a letter, as I recall, to Mr. Weber
Andreae, if my memory serves me, wherein he said "These
views"—and I am not sure whether he referred to Rup-
precht's letter or Beschorman's letter, but I think he re-

ferred to Mr. Beschorman's letter—"These views were also conveyed to me."

Now they could have been conveyed to him only at the one place that he has testified to, namely, at the session with Mr. Rupprecht. Now, in order to get a more
2976 precise definition of the views conveyed to him at the session with Mr. Rupprecht, we have here a statement with which we ask him to make a comparison. I think it is not unfair under the circumstances.

Mr. WHITNEY. Would your Honor permit me to point out that it is not true that he has not testified as to what Mr. Rupprecht said, and I am laying aside the direct examination. He testified on cross-examination that Mr. Rupprecht talked about the Executive Committee—

The COURT. That is right.

Mr. WHITNEY. —that he talked about the fact that "You are secured against that through your patents"; that he talked about the fact that "for legal reasons," all three of which were used at one moment or another by the witness. He testified at considerable length as to what Rupprecht said. To get at what Rupprecht may or may not further have said, by confronting him with a letter by a third party on a different subject, two and a half pages in length, would be in my respectful view prejudicial error, your Honor, and I want to press it because I really feel it very strongly. Mr. Dixon has been allowed great latitude, and I am satisfied he could go on another twenty-four hours trying to get at what Rupprecht said, in addition to what I have read to your Honor and what has been testified to.

The COURT. I will allow it.

Mr. WHITNEY. I respectfully except.
2977 The COURT. If you haven't lost the question as the result of all this legal debate, can you answer it?

The WITNESS. What I mean—excuse me; you want to get to the truth of this matter.

The COURT. Yes.

The WITNESS. Isn't it really the best thing to base on what I have—I wrote at that time?

The COURT. What did you write?

The WITNESS. When I have my recollection about this—I mean, I am now talking about recollection, talking about what I think was the case at that time I can't put down exactly. But my general impression from that time was

that I was very dissatisfied really with the situation as it was. I had to act as a good soldier. And I was trying to express, to convey the situation to Weber Andreane and the others with the idea of, as you may call it, neutral, being neutral or of being diffident. And, therefore, I was trying to refer to Beschorman, who had given me things. You see what I mean. And I think when maybe—it sounds different to you in what I may have intended, but it seems to me that about saying here:

“Considering the views and interpretations as expressed by Mr. Beschorman, and by Mr. Rupprecht in his letter to Mr. Beschorman, it seems to me that a co-operation can be looked to which will be of important benefit to Titangesellschaft.”

The COURT. Go ahead. What else did you say in that letter?

The WITNESS. But before that, if your Honor wants that part—

The COURT. Let me look at it.

The WITNESS. You have to refer to Beschorman's letter.

By the COURT:

Q. Let me read to you this passage, the first sentence is to the effect that you were enclosing a letter to I.G. Now that is a letter from Mr. Beschorman; that is the letter from Mr. Beschorman dated July 12th.—A. And which enclosed also I think the letter to Beschorman, the copy of letter.

Q. Then you say, following that—you listen carefully to your sentence, then I will ask you a question:

“I have met Mr. Rupprecht . . . who verbally has expressed to me the same view as to the future co-operation which has been expressed by Mr. Beschorman.”

Now what I want you to tell me is, at the time you wrote those words did you feel or did you not that you were making an accurate comparison that the views expressed by Mr. Beschorman as to future cooperation were

also the views expressed by Mr. Rupprecht as to future cooperation? I want you to tell me as truthfully

as you can recall whether that paragraph did represent your then state of mind.—A. I can only express what I may call what I feel about it, and that is that it was in general terms, talking about it without going exactly in one way or the other. If you look back at it, I felt at that time, I felt that I was in a very difficult position, and I felt that on the one side my personal in-

erest was not very much of doing this thing; on the other side, National Lead or Beschorman wanted me—or wanted, rather, to have this thing through. So, my intention was to put the responsibility on Beschorman and National Lead as much as possible. You see what I mean?

Q. I understand all that. But you did say in your letter that the views expressed in Mr. Beschorman's letter, "as to a future cooperation," are the same views which were verbally expressed to you by Mr. Rupperecht. Now, was that the truth?—A. I hope so, but I can't recall.

Q. You did not intend to tell other than the truth when you wrote your letter of July 21st?—A. No, I would not say that.

Mr. WHITNEY. Your Honor, I think your Honor will recall that under cross examination he said this: I thought this may work out all right when the time comes, so I tried to write a few words to Weber Andrae and Kühne to convey that impression.

The COURT. All right, you can develop that.

Mr. WHITNEY. That was on cross examination. But, if your Honor please, respectfully, the point is this: The question, so far as I am concerned, is what du Pont did. Now, the question as to what Mr. Jebsen thought they did or as to what I.G. was caused to think they did are collateral matters. And I think Mr. Dixon having developed that subject and having received a clear response, the essence of which is to convey that impression because "I thought this may work out all right," he is not entitled to come back to the same subject and try to cross examine on the answer that he obtained before.

The COURT. Oh yes, he may. There is no such rule of cross examination. That is the essence of the art of cross examination, that you are not bound by the previous answer of the witness, either of your own or of your adversary's.

Mr. WHITNEY. But, your Honor, it is one thing for Mr. Dixon to do it and it is another thing for your Honor to ask the witness whether something is honest. That puts him in an impossible position if I may respectfully suggest it.

The COURT. No. "honestly" there would not necessarily have anything to do with it because I was
2981 trying to develop the very point which you call to my attention, namely, that he had testified that

he may have had some motives other than strict accurate reporting in expressing those views, and I was trying to find out whether that was so. His answer to that is on the record. I don't have to elaborate on it.

Mr. WHITNEY. You were putting it to him so strongly, your Honor.

The COURT. I will put it to him softly or strongly as long as I can get his true answer.

Mr. WHITNEY. You might get different answers. People are only human, they have proper respect for the Court and to the Court's questions may give different sorts of answers than to counsel's questions.

The COURT. I will suggest that you can put the question to him in any other shape, intermediate or outside of the shapes I have tried in several attempts I have made. I want you to be sure of this, that the only difference between the bench and bar is that the Court does not draw a blank as to what the answer is. So what comfort which the Court derives from a trial is denied to the bar?

Mr. WHITNEY. There is an undue tendency even on the part of the most truthful witness to be responsive to the Court.

The COURT. Well, that may be. You see Mr. 2982 Whitney, we have two communications—I want you to understand why I am driving at it. We have a written communication from Mr. Rupprecht and we have evidence that exists of an oral communication from Mr. Rupprecht. What the written communication is is not in dispute because we have the written evidence of that communication. What the oral communication is is enshrouded in vague memories. However, we have a contemporaneous communication which makes some reference to that oral communication. And I think cross-examining counsel, with or without the aid of the Court, can mine in that contemporaneous communication for whatever it will yield. Maybe when it is all dug up the question of weight will still be very troublesome.

Go ahead, Mr. Dixon. I did not mean to take up so much time.

Mr. Dixon. That is entirely all right, your Honor.

By Mr. Dixon:

Q. Just one more question. Dr. Jebesen, with reference to your conference with Mr. Rupprecht, if you recall, did he say anything to you about not being able to give you any further assurances in writing other than those

given in the letter of June 28th to Mr. Beschorman?—A. I don't think that came up.

Q. By the way, was Dr. Blumenfeld over here 2983 in this country at this time, do you recall?—A. Yes, I think so. He was over here some part of that time, but exactly the dates I don't remember.

Q. Do you recall seeing him with Mr. Chase and Mr. Beschorman?—A. I recall seeing him with Mr. Beschorman but I can't remember if Mr. Chase was there, but probably he was.

Q. What was the general subject?—A. Yes, Chase was there. Pardon me.

Q. Of your discussion with Mr. Blumenfeld at that time, if you recall?—A. He discussed the arrangements, the contemplated or what you may call proposed possible arrangements in Europe.

Q. By that you mean the arrangements theretofore discussed by you and Dr. Blumenfeld and Aussig, and also Montecatini?—A. Yes. Somewhat of a continuation of that. I believe at that time the question of exchange of licenses was not in. I am not quite certain about that.

Q. But I take it the conferences between you and Mr. Beschorman and Mr. Rapprecht with reference to this contract were not discussed with Mr. Blumenfeld in July of 1933?—A. You mean the du Pont contract?

Q. Yes. That was not discussed with Dr. Blumenfeld?

—A. No.

2984 Mr. WEBSTER. I want to be sure your answer was "No, it was not discussed." Is that right?

The WITNESS. Pardon me?

Mr. DIXON. That is right.

Mr. WEBSTER. Your answer was no—

The WITNESS. No, it was not discussed.

Q. Now, Doctor, I hand you what has been marked Plaintiff's Exhibit 887 and ask you to refer to page 4 thereof and state to the Court, if you will, as to whether the items or correspondence described on page 4 of that exhibit have any particular significance or meaning to you as an officer of Titan Company?—A. Which paper is this? Whether these letters have a meaning to me?

Q. Yes. That are set forth on page 4 of this exhibit.

Mr. WEBSTER. May he have an opportunity, first to identify it, to see what the exhibit is, that is, the remainder of the exhibit?

A. These are just a number of letters and cablegrams, it seems to be.

Q. Will you refer to the exhibit, 887, Doctor, and state if you ever saw that before?—A. Yes, this is of June— which date is this? Is this the one of June 8, 1930, isn't it?

Q. 1938.—A. 1938. Yes.

Q. Now, you have seen that before, haven't you, Doctor?—A. Yes.

2985 Q. Did you have anything to do with the preparation of that memorandum?—A. Yes.

Q. Now I will ask you to turn to page 4 again and examine the list of letters set forth on page 4 of that exhibit and state to the Court whether as an officer of Titan Company, Inc. those letters have any significance to you?

The COURT. I hear no objection.

Mr. WEBSTER. I only refrain because I don't want to—

The COURT. Don't refrain to save time. Did I hear one?

Mr. WEBSTER. Yes, I do object.

The COURT. Sustained.

Q. Did you prepare this portion of the memorandum, Doctor, this Exhibit 887?—A. That I can't tell you. Isn't this a memorandum which was written after a visit to Wilmington, or is it before a visit to Wilmington?

Q. I am sure I don't know.

Mr. WEBSTER. I can't hear you.

The WITNESS. He asked whether this memorandum here—I can't see the date of this memorandum; it is just June 1938.

Q. The date, Doctor, is June 8, 1938. Does that refresh your recollection?

2986 Mr. WEBSTER. No. I thought the meeting was on June 8th.

Q. June 9th.—A. June 9th I believe—yes, that is what— well, that is after; June 8th was the meeting; I had a meeting down in Wilmington with Mr. Rupprecht and this was written after that meeting.

Q. And you prepared, did you, page 4 of that exhibit?—A. That I don't know, whether I prepared that page 4 or not. The whole thing here was worked up rather in haste after the visit down in Wilmington, and I think that was a combined effort of Mr. Kaegbehn and myself. And these letters here which are from 1933—of course I won't say whether I can recall all of them—whether they have been put in by Kaegbehn or by myself I can't say at the moment.

2987 Q. Well, do they have any particular meaning to you as part of this exhibit?

Mr. WEBSTER. I object to that.

The COURT. I will sustain the objection. There must be questions which you can frame to elicit the answer that you want. That is not one of them.

Q. Will you state to the Court, Doctor, the reason for those letters being attached and made a part of this exhibit, if you can?—A. I suppose that this was done at the time where I was very dissatisfied with the developments of the relations with du Pont. I had been trying to get them into line with the 1920 agreement, and I suppose this is just trying to recall for Kaegebehn and myself what the history was of that situation, taking out those letters which you considered to be the more important ones, and giving that history.

Q. In other words, to you those letters were the more important ones dealing with any matters arising during the date of those letters with reference to the relations between Krebs and Titan Company, Inc.?

Mr. WEBSTER. Your Honor, that is objected to as repetitive and argumentative. It is not a question but a statement of fact.

The COURT. I will let him answer it. You may answer the question.

2988 The WITNESS. Will you repeat that question? (Question read.)

A. With the reservation that it may have been put in by Kaegebehn and not myself.

The COURT. You don't remember that?

The WITNESS. No. I would say yes, probably they are—

The COURT. You were collaborating?

The WITNESS. We were collaborating on this matter. After all, you have to go through each letter to find out really what they are. I mean, I don't remember every date on these letters which you have put down there. But trying to work out a memorandum of this kind, naturally you would be very apt to put in these letters which you considered to be the important ones.

Q. You were here in the United States in 1940, were you, Doctor?—A. I arrived here on the 15th of July, 1940.

Q. And you have been here more or less ever since?—

A. Yes.

Q. Were you acquainted with any of the negotiations had between the du Pont Company and the National Lead

Company when the 1933 agreement was being amended?—
A. I didn't take part in any of the conversations about that, but I was consulted. But I was present in the negotiations with Mr. Rupprecht.

2989 Q. You were not present?—A. As far as I remember, not, but I was consulted.

The COURT. Consulted about your side of the picture?

The WITNESS. Yes. I mean Garesche, I think it was Garesche who was dealing with it and talked with me about it; and I can't remember that I was present with Mr. Rupprecht. If I have been I have not taken part in the conversations.

Q. I will hand you what has been marked Plaintiff's Exhibit 507 and ask you to examine the same.—A. This is a letter to Garesche—

Q. Yes.

Mr. WEBSTER. Your Honor, if the purpose of this is to get the witness to refresh his recollection as to whether he himself recapitulated in written form certain previous correspondence simply by giving the letters by dates, it is immaterial, and the fact that he did so does not seem to me to make any difference on the issues in this case.

The COURT. We are still trying to arrive at certain oral as opposed to written communications.

Mr. WEBSTER. But the fact that he undertook to set down by dates certain previous correspondence would seem to me a perfectly—

2990 —The COURT. An innocuous thing unless it serves to remind him as to some conversation.

Mr. WEBSTER. (Continuing) —a perfectly neutral fact.

Q. Now, that was prepared by you, was it not Doctor?—

A. I think so.

Q. Mr. Kaegebehn didn't prepare that?—A. No, I don't think so.

Q. Now, referring to page 3 of this exhibit, I will ask you to compare the letters named or described on page 3 of that exhibit with those contained on page 4 of Exhibit 887.

Mr. WHITNEY. That is objected to as a collateral waste of time.

The COURT. Are they the same?

Mr. DIXON. They are.

The COURT. All right. The witness will take your word for it that they are the same.

The WITNESS. Yes, but I don't think they are.

The COURT. If they are not—

The WITNESS. One, two, three, four, five, six, seven; and here you have one, two, three, four, five six, seven, eight, nine. There are two more here anyhow.

Q. You added the other two letters or took out two of the letters?—A. Which are here (indicating).

Q. Which were in the Exhibit 887?

2991 Mr. WHITNEY. That is objected to as having no foundation and no sign that he was looking at the earlier exhibit when he wrote the other one two years later.

Mr. DIXON. I would like to be able to get a question in.

The COURT. Very well, let us proceed. What is the question?

(Question read.)

Mr. WHITNEY. That is objected to.

The COURT. Objection sustained.

The WITNESS. I did not get that. Is that a question?

The COURT. Never mind. Do they correspond to any extent?

The WITNESS. I think so. Some of them are the same, but not all of them, as far as I can see.

Q. And the ones that you put in Exhibit 507 to direct to Mr. Garesche's attention in August of 1940, were the ones which you regarded of significance in the relations between Titan Company and the du Pont Company; that is a fact, is it not?

Mr. WEBSTER. I object to that, your Honor.

The COURT. Go ahead. Answer the question. You regarded—

A. Yes, I mean, after all I probably—I haven't
2992 read these so I can't tell you now, but I wouldn't put them in unless they were of interest.

The COURT. You were not interested in preparing a catalogue.

Next question.

Q. So that those letters did in your opinion bear upon the relations between Krebs or the du Pont Company and the Titan Company or the foreign associates of the Titan Company, Inc.; is that correct?

Mr. WEBSTER. I object.

The COURT. Objection sustained.

We will suspend at this point.

(Adjourned to Friday, January 26, 1945, at 10.30 a.m.)

2993

UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

NEW YORK, *January 26, 1945, 10.30 o'clock a.m.*

Trial resumed.

GUSTAV ADOLF JEBSEN, resumed the stand.

Mr. WEBSTER. May I make a correction?

Mr. DIXON. Yes; we have a few too, Mr. Webster.

The COURT. These casual corrections do not mean that you have abandoned the practice of making more complete ones?

Mr. WEBSTER. No, not at all.

Your Honor will recall Mr. Barton. He is still here. He has been over his testimony rather carefully, and it is no reflection of any sort on the reporters to say that he has found several inaccuracies or errors that he would like to correct. Now, I have told him that I don't think there is any occasion for him to resume the stand and that I think all of these changes are of a character which will be accepted without objection by anybody: They are in the nature of either typographical changes or slight corrections where the reporter has not heard exactly or Mr.

Barton has failed to state exactly some of these
2994 chemical terms. I therefore have got up a schedule of those and I suggest that it be taken into the record as the others have, subject to the right of Mr. Dixon of course to make further corrections if he desires. (The schedule above referred to appears in full at pages 3121 to 3125a hereof.)

Mr. WEBSTER. Before you resume your cross-examination I would like to make another—

Mr. DIXON. I have some corrections to make.

Mr. WEBSTER. All right.

Mr. DIXON. May it please the court, on the 5th line of page 2948 I believe it should be after Dr. Kuhne's name "when he went" or "Mr. Beschorman".

The COURT. "to use that word that you used, to Dr. Kuhne"—"when he went"?

Mr. DIXON. Yes, meaning Mr. Beschorman. If we could substitute the words "when Mr. Beschorman went" it would be much clearer.

The COURT. All right. "when he went" is clearer.

Mr. DIXON. And on page 2951, the middle of the page, I believe it is "research laboratory".

Mr. WEBSTER. Yes, I noticed that. I believe that word had not yet been coined.

The COURT. "research".

2995 Mr. WEBSTER. Instead of "ersatz".

Mr. DIXON. And the 8th line from the bottom of 2963 I believe the word "On" should be added to my statement—"On June 28th". In other words, you were inquiring I believe about the date of the letter.

The COURT. Is that all?

Mr. WHITNEY. Your Honor, although we never attach much importance to what counsel says, when it takes a little twist here, something I said which is so unfortunate from my point of view, I would like to correct it. At the bottom of page 2949. A natural slip on the part of the reporter caused me to say to Mr. Dixon, "Never mind any examination as to what anybody said or wrote." What I did say of course was, "I never mind any examination as to what anybody said or wrote."

It would be helpful in the next line if there were quotations around "what was in your mind". "I was a little reluctant about 'what was in your mind.'"

The COURT. Very well.

2996 Mr. WEBSTER. Your Honor, in connection with the examination of Dr. Jebesen, I would like to suggest, if I may, a consideration which I think has not been brought out either by Mr. Whitney or Mr. Dixon or by the Court. It requires me to go back over one or two questions and answers and then to make my statement relating thereto.

The COURT. What is the page reference?

Mr. WEBSTER. Page 2973, at the foot of page 2973, your Honor asked this question:

"Q. After your meeting with Mr. Rupprecht, if your assistant, a hypothetical assistant, attending that meeting, had prepared Mr. Beschorman's letter as a draft of a communication to be sent by you to the I.G., would you have felt, or do you feel, that such a draft would have accurately portrayed the results of your conference?"

To which Jebesen replied: "Again it demands for an exact memory as to what happened in that meeting."

Your Honor said:

"Q. Of course, there were a certain number of important principles that you came there to discuss, and it is with reference to those important principles that I would like you to focus your mind and tell us whether your impression, and at best we can now have no more than an

impression of what occurred in that year, corresponds to the impression conveyed to the I.G. by the text of 2997 Mr. Beschorman's communication."

I then suggested that this was getting into an area where language-shading might affect the consideration of the question in such a way as to perhaps prejudice the witness.

Then again on page 2977 there was a discussion about whether or not that question should be answered, and the question was answered, and the witness said:

"When I have my recollection about this—I mean, I am now talking about recollection, talking about what I think was the case at that time I can't put down exactly. But my general impression from that time was that I was very dissatisfied really with the situation as it was. I had to act as a good soldier. And I was trying to express, to convey the situation to Weber Andreae and the others with the idea of, as you may call it, neutral, being neutral or of being different."

The COURT. No, "diffident" was the word he used.

Mr. WEBSTER. (Continuing reading): "And, therefore, I was trying to refer to Beschorman, who had given me this. You see what I mean. And I think when maybe—it sounds different to you in what I may have intended, but it seems to me that about saying here:

"Considering the views and interpretations as expressed by Mr. Beschorman, and by Mr. Rupprecht 2998 in his letter to Mr. Beschorman, it seems to that a cooperation can be looked to which will be of important benefit to Titangesellschaft."

Then the Court asked this question; which brings me down to the point of my remarks—on page 2978:

"Q. Let me read to you this passage, the first sentence is to the effect that you were enclosing a letter to I.G. Now that is a letter from Mr. Beschorman; that is the letter from Mr. Beschorman dated July 12th.—A. And which enclosed also I think the letter to Beschorman, the copy of letter."

"Q. Then you, say, following that—you listen carefully to your sentence, then I will ask you a question:

"I have met Mr. Rupprecht . . . who verbally has expressed to me the same views as to the future cooperation which has been expressed by Mr. Beschorman."

"Now what I want you to tell me is, at the time you wrote those words did you feel or did you not that you were making an accurate comparison that the views ex-

pressed by Mr. Beschorman as to future cooperation were also the views expressed by Mr. Rupprecht as to future cooperation? I want you to tell me as truthfully as you can recall whether that paragraph did represent your then state of mind?"

2999 And Dr. Jebson replied:

"A. I can only express what I may call what I feel about it, and that is that it was in general terms, talking about it without going exactly in one way or the other. If you look back at it, I felt at that time, I felt that I was in a very difficult position, and I felt that on the one side my personal interest was not very much of doing this thing; on the other side, National Lead or Beschorman wanted me—or wanted, rather, to have this thing through. So, my intention was to put the responsibility on Beschorman and National Lead as much as possible. You see what I mean?"

Then another question by the Court:

"Q. . . . But you did say in your letter that the views expressed in Mr. Beschorman's letter, 'as to a future cooperation,' are the same views which were verbally expressed to you by Mr. Rupprecht. Now, was that the truth?—A. I hope so, but I can't recall."

And then your Honor wound that up by saying:

"You did not intend to tell other than the truth when you wrote your letter of July 21st?—A. No, I would not say that."

Now there have been other phases of the case in which Mr. Whitney's interest has been less than mine so far as the subject matter is concerned, and I think perhaps 3000 this is a phase of the case in which in reference to the subject matter his interest may be greater than mine. But I do have this important interest in the case, and that is with reference to Dr. Jebson, who has taken the stand for the purpose of giving his testimony. Now I think that this whole matter must be considered with reference to the statements which he has made at all times, that he was unable, and I use words that appear in the record, "to pin Mr. Rupprecht down," and also the statement that Mr. Rupprecht was "slippery."

Now taking into consideration that that is the gist and the substance and burden of his testimony with reference to this matter, I think it is important again to examine what it was he said. He said he was enclosing the letter from Mr. Beschorman, the substance of which we are now all well acquainted with, that there was a letter from Mr.

Rupprecht, and that Mr. Rupprecht had orally said what he said in his letter,—

Mr. DIXON. If the Court please—

Mr. WEBSTER. —and he has been taxed with the question of whether or not what he said in the letter as to what Mr. Rupprecht had said was true.

The COURT. I do not follow, to be candid with you, Mr. Webster, the object of the colloquy.

Mr. WEBSTER. The object is simply this, that
3001 ~~Mr.~~ Mr. Rupprecht, your honor himself stated, . . . we have Mr. Rupprecht's letter which is, as we know, evasive, which simply says "I think you will find that conditions will be eminently satisfactory," and it seems to me therefore pointless on cross-examination to try to, in the case of a man who does not have mastery of the English tongue, to say "Did Mr. Rupprecht say to you what he says in his letter," and he says "Yes, he did say that." But what is the purpose of the proof, except—

The COURT. Mr. Webster, I think you misconceive the whole purpose of the questions put by the Court, and I think you probably misjudge the value assigned by the Court to the results of that inquiry, which, I sadly confess to myself, have not produced as much dividend as I had hoped they would. In my inquiry I thought I made it plain yesterday that you had this situation; you had a written communication from Mr. Rupprecht which, of course, is in evidence, and is, of course, an important piece of evidence as to what Rupprecht said or understood and agreed, and to the extent of that material there it is in the scales of evidence.

In addition and supplementary thereto you have evidence of a conference at which oral communications were made by Mr. Rupprecht to Dr. Jebesen and Mr. Beschorman.

We were engaged yesterday in a quest to ascertain
3002 what was the substance of those oral communications, to determine whether (a) they varied the written communication; (b) added thereto; or (c) lessened the substance of that communication whatever it might be. And if we were able to deal with an event of recent occurrence, and if we were able to deal with a witness who had a very clear recollection of the details of that conversation, all these hypothetical explorations would, of course, have been pointless, fruitless, and probably improper and inadmissible. But we were dealing with a transaction of relative antiquity. We were dealing with a witness whose memory on the subject was relatively faint, and I tried to

do what is normally done under the circumstances, which is by one device or another, prod the witness's memory. I do not mean prod an unwillingly memory but I mean to revive a faint memory, which sometimes is successful, by association, comparison association of ideas, reference to written documents, and contemporaneous events. I confess that the sum total was not as productive as I hoped it might be, but whatever it is, there it is. The amount of weight to be attached to it is the question I always reserve until the very end when the whole thing can be judged in its proper setting. I am at a loss to understand what it is you want to know; that I should assign less 3003 weight than I have or you think I should assign?

MR. WEBSTER. No. In looking over this record rather carefully last night I had a feeling we were being carried along with the idea expressed in one or two of your Honor's questions, that there was some inconsistency between what Dr. Jebsen had said on the stand and what he had said in his letter to Weber Andreae and to I.G.

THE COURT. I did not really, and if there is such inconsistency I am going to let Mr. Dixon point it out to me in his brief. So far all I have been trying to do is to ascertain what occurred at the oral conference, and we have certain pointers; the fact that Dr. Jebsen wrote a letter in which he said that what Mr. Beschorman said as to future cooperation was "also expressed to me by Mr. Rupprecht" as a slight evidence because those words in themselves are highly ambiguous. It may be that those words mean that Mr. Rupprecht had said "such is our policy with respect to Europe, such is our economic posture, that I do not see why you gentlemen need concern yourselves with this problem. I don't know why you are worrying yourselves about our activities in Europe. Just let us alone.—We think everything will be all right." Maybe that is what he said. Maybe he said, "I hereby solemnly swear and agree I shall never sell a pound of titanium in 3004 Europe. I don't want to put it down on paper because Mr. Dixon's sleuths will be after me, but you know me as a gentleman and that I will not break my word, and you can go away and feel completely content that you will have no competition from us in the European market."

There are the two possible extremes. Maybe I have not even given the complete extreme. Maybe all he said was, "If you want to do business with du Pont you will just have to take chances with du Pont, which is a responsible

organization, and we usually do not hurt our friends, but no promises whatever." That is about as far as we get. We have the whole range of possibilities.

Mr. WEBSTER. Yes. I think it is an important point. I simply thought Dr. Jebesen was not adding or subtracting anything from what Mr. Rupprecht said in his letter.

The COURT. That may be. I will examine his testimony and weigh the two documents and see whether or not they add up or subtract the same. I have not formed any definitive conclusion in my mind, but I have no objection to revealing what is in my mind. There is one advantage in dealing with a jury of one as opposed to a jury of twelve. A juror of one can disclose how his mind is reacting. I think thus far I have gotten, that at the

3005 conclusion of a conference with Mr. Rupprecht, Dr.

Jebesen felt somewhat reassured as to the possibility of trouble with the du Pont people in the European Continent. Now whether that was the result of promise, or the result of intention, or simply the result of greater understanding of du Pont policy, I am, I will say, so far more or less in the dark.

Mr. WHITNEY. Your Honor, a little different from Mr. Webster; I want to say that my afterthoughts were I had been a little too active yesterday, and we all had been perhaps other than your Honor, whose duty it is to be active at any stage, and that presented to me one thought overnight and that was this, that your Honor pointed out that these were matters of antiquity.

The COURT. Not within the terms of the customs statute.

Mr. WHITNEY. Well, it occurred to me that in a case where the prayer is for an injunction, matters of antiquity are of very small importance.

The COURT. I agree with you.

Mr. WHITNEY. And we were out of proportion in the emphasis we were giving to antiquity in this equity case.

The COURT. Proceed.

3006 Cross examination continued by Mr. DIXON:

Q. Dr. Jebesen, after your conferences with Mr. Rupprecht in July of 1933, you returned to Europe, did you?—A. Yes.

Q. And did you have any conversations with Dr. Raspe when you returned from your conferences in the United States with Mr. Rupprecht?—A. With Dr. Raspe?

Q. Yes.—A. You mean concerning the subject matter we were talking about yesterday?

Q. Yes.—A. I don't remember.

Q. Well, do you recall whether or not—A. I do not think I would have had that because Dr. Raspe was not a man in authority regarding this matter at all.

The COURT. He was a plant manager, wasn't he?

The WITNESS. He was a plant manager, yes.

Q. Did you talk with Weber Andreae about it?—A. I met Weber Andreae in the ICI building in the lift incidentally when I came back, and I told him I had sent a letter to Frankfort about it and wanted to have this thing attended to as quick as possible, and he promised he would see to do it so. This was in the summertime and there were holidays going on here and there, but the idea was to get this thing out of the way as quick as possible.

Q. Do you recall whether you said anything to him about friendly relations being now established between du Pont and Titan Companies?—A. No, nothing special in that respect.

3007 Q. Or anything with regard to an exchange of technical assistance or information between the two companies?—A. No. We were just meeting in the elevator, going up or down I don't remember, and we just talked in the elevator; other persons were there too at that time. So there was no place of going into any—

Q. Well, did you discuss this matter with anyone else, with either TG or IG?—A. Not that I remember. What happened was I went to Paris and there were a few telephone conversations between Frankfort and myself. They sent over a draft to the letter, to the answer they want, and I corrected one or two things—I don't remember exactly what, smaller matters—and that was all.

I would like to mention, if you don't mind, reading those letters yesterday evening—perhaps it would be a little help for your Honor to see the German text of that letter which the IG wrote in answer to this.

The COURT. You mean in preference to the translation?

The WITNESS. Yes. There was one expression which is not a very exact translation of the German letter. It is very difficult perhaps to find a word—

Q. You mean the one relating to delimitation of territory?—A. I mean the one of August 7th in which they say—it is addressed to me; to be sent on to New
3008 York, but they say:

The point of view which the National Lead Co. has taken in the letter of July 12th signed by Mr. Beschorman, Vice-President, and which appears from a letter from the Krebs Pigment & Color Corporation of June 28th 1933

signed by Mr. C. H. Rupprecht, President, of which also a copy has been submitted to us, does not formally correspond with the wishes which we expressed to you in our letter of June 20th 1933."

Then it comes:

"We note" . . . from these letters the assurance that National Lead Co. and Titanium Pigment Co. as well as their new American Contract Partner, the Krebs Pigment & Color Corporation, will loyally respect"—

Now, in German it says not "We note", but they say "entnehmen diesen Briefen jedoch die Zusage," and so on.

The COURT. Have you got the German text in front of you?

The WITNESS. Yes.

The COURT. May I look at it?

The WITNESS. Now, the word "entnehmen"—

Mr. WEBSTER. Wait until his Honor reads that sentence.

3009 The COURT. What were you going to say about the verb "entnehmen"? You say that it is not accurately translated by the word "note"?

The WITNESS. Yes. I mean perhaps it is more correct—better—to say "that we deduct" or "take out" from this letter, not say "We note"—

The COURT. You mean the word "deduce"?

The WITNESS. "deduce", yes.

The COURT. Very well.

The WITNESS. I don't know whether that would help. That is my understanding of the word "entnehmen".

Q. The IG or TG did subsequently send a letter to Titan with reference to another interpretation placed upon one of their letters in which they said that they were referring to delimitation of territories in their reply of August to Titan, didn't they, Doctor?—A. Yes.

Q. You are familiar with that letter, are you?—A. That was the correction of the first one, or an explanation of the first one.

Q. As I recall it, I think that was correct.—A. Yes.

The COURT. Was there something else you wanted to add before Mr. Dixon put the question.

The WITNESS. No, just the one thing, that if there had been any oral understanding—some explicit discussion
3010 between Rupprecht and myself in that meeting with Beschorman, I think it would have been.

natural for me to go to the Germans and explain that.

The COURT. Very well.

The WITNESS. Whereas I didn't pay any visit to Germany at all. In other words, I left the weight of the thing on the correspondence as it was.

Q. Do you recall whether you discussed this matter with any of the other IG or TG officials?—A. Over the telephone, yes. But that was just concerning the formation of the reply, as far as I remember.

Q. Well, I referred a moment ago to a correction made by IG in one of their letters, namely that of August 7th, as set forth in Exhibit 288. Do you recall such a correction in the German letter of August 7th, 1933?—A. Do you mean the definition of "Gebietsabgrenzungen"?

Q. Do you recall that correction by the Germans?—A. From what I have read about this, yes, not from—I mean, I had to refresh the whole thing from reading those letters; so I am basing myself on what I read.

Q. But you do recall that they made clear in that correction the meaning which they attach to the German word "Gebietsabgrenzungen", that it is the correct word?—A. Yes. I recall that there was an incident of that kind, but the mere thing when I recall it is being reminded of it through the letter.

3011 Q. Do you know how that correction arose or what the occasion was of the Germans sending that letter to you, Doctor?—A. The word—

Q. As shown in Plaintiff's Exhibit 288, for the purposes of the record.—A. I was in doubt whether that word referred to what you may call territorial frontiers or whether it referred to Licensed Field.

The COURT. Yes. Licensed Field.

Q. Did you raise the question with the Germans as to what they meant by the use of the word?—A. It is all in the letter, Mr. Dixon.

Q. I understand.—A. And my memory is refreshed from the letter, to be quite frank.

Q. Would you like to see the letter?—A. No, I mean I don't think that is necessary.

Q. I thought it was not.

The COURT. What you mean is that you have no recollection over and above what is in the letter?

The WITNESS. No.

Q. But you don't recall how that particular matter happened to be discussed between you and IG?—A. No.

Q. Well, now coming back to your return to Europe

after the conferences, did you discuss this with any other officials of TG or IG. That is this matter of the proposed contract between Krebs and du Pont?—A. Not that I remember.

3012 Q. Or Krebs and National Lead?—A. Not that I remember.

Q. Did you say anything to anybody about this agreement being one which would establish a cooperation between du Pont Company and the Titan companies?—A. Not that I remember. My impression—I am just trying to pick out—my impression is that the thing was left as it were. I think the Germans understood perfectly well—

Q. Now I am—

The Court. You had better suspend that.

Q. But Mr. Rupprecht had told you when you were in the United States that this would work out satisfactory, didn't he?—A. He said it would turn out eminently satisfactory.

Q. And do you recall whether, after you returned to Europe in the year 1933, anyone visited the Krebs plant in the United States from TG or IG?—A. Sometime, some years later, I think it was, I don't remember when, Dr. Raspe was over here and I believe he was down there; I can't remember exactly, but I believe he was down there. It seems to me that it would have been natural that he visited the plant.

Q. Are you certain that— A. Pardon me. When you ask about that, may I mention that some years later, I believe it was some years later, I mean, Dr. Kuhne was over here and visited; he made a trip throughout
3013 the United States throughout the United States and visited du Pont, too. Not particularly concerning titanium. He—

Q. When was that, if you recall, Doctor—A. No, I don't recall which year. But I think you can find that someplace.

Q. In any event, you think it was considerably after 1933?—A. I believe so, but really I don't remember exactly.

Q. Would you say to the best of your recollection that there was no, what we will call, technical cooperation in the sense that someone from TG was permitted to visit the plants of Krebs and anyone from Krebs would be permitted to visit the plants of TG after you made the 1933 agreement?—A. I believe Dr. Raspe was over here

a year before Dr. Booge—Dr. Booge came to Leverkusen one time.

Q. When did he come, do you know?—A. In 1937, I think it was.

Q. Who is Dr. Booge?—A. He was the head of this research department concerning lithopone and titanium pigments in du Pont.

Q. Do you know whether he was over visiting the TG plants before 1937?—A. I don't think so.

Q. Do you know whether anyone from TG or IG was over to the United States prior to 1937, visiting the Krebs plant?—A. I believe that I do recall that Dr. Raspe 3014 was over here before that time and visited the plant. I believe that was the case. So that it was a kind of mutual courtesy—one saw the one plant and the other saw the other.

Q. How did Dr. Raspe happen to visit the Krebs plant in the United States, do you know?—A. Well, Dr. Raspe came over here to visit the National Lead Company's plants and, I suppose at the same time he was brought into contact to visit the other one.

Q. Did you say anything to Dr. Raspe that if he came over to the United States he could visit the Krebs plant?—A. No, I did not say anything about that, as far as I remember. After all, that would be in the hands of the National Lead Company over here to see if that could be done.

Q. Well, do you recall when Dr. Raspe made this visit to the United States to inspect the plants of National or Krebs, if he did?—A. I think I said that I thought it was the year before Dr. Booge came over to Europe.

Q. That would be about 1936, in your recollection?—A. No. I say I believe that was the time.

Q. About that?—A. Yes. I am deducting that practically from the events as they came.

Q. Would it refresh your recollection any as to whether there was any cooperation in the technical sense between du Pont and the Titan companies if it appears that 3015 Dr. Raspe visited the Krebs plants before that time.

Mr. WHITNEY. I don't think that is warranted unless he has evidence to support it, your Honor. He is putting to the witness a situation that he is refreshing his recollection by a statement to the contrary of what the witness said.

The COURT. That is permissible cross-examination. You

may suggest to the witness an answer and ask him whether it is true.

Mr. WHITNEY. If he has any evidence to support it, your Honor, is not that right?

The COURT. Not necessarily.

Mr. WHITNEY. It is intimidation; otherwise.

The COURT. Oh, of course, if it reaches that proportion I would interfere.

Mr. WHITNEY. If a man that has been working actively on a case and has 4,000 pages of paper under his hands suggests to the witness that it is a fact that a certain thing is disclosed by the evidence, I suggest that that has to be supported by the evidence.

The COURT. Oh yes, if he says it is disclosed by the evidence.

3016 Mr. WHITNEY. I don't think Mr. Dixon has any personal knowledge of this, and anything he says must be based on evidence. I would like to know whether it is.

(Question read.)

The COURT. Before which time? Meaning 1936?

Mr. DIXON. Yes.

Mr. WHITNEY. I don't think that is a proper way to refresh his recollection.

The COURT. Are you prepared to show that Dr. Raspe did visit before 1936?

Mr. DIXON. Yes.

The COURT. Very well, I will take counsel's statement.

The answer is yes or no. Would it refresh your recollection if you were told that Dr. Raspe did visit the plant before 1936?

The WITNESS. If you can show me the evidence I can tell afterwards whether my recollection will be refreshed.

The COURT. The answer is "I don't know."

Mr. WEBSTER. I don't think it would make any difference if he did.

The COURT. That is beside the point. Let us proceed.

3017 The WITNESS. Perhaps that would help you, Mr.

Dixon. May I state that it was the rule that our contact with du Pont was through the National Lead Company.

Q. What I am endeavoring to find out, if you can recall, Doctor, is whether or not there was any technical cooperation arranged for between Titan and du Pont in your conference with Mr. Rupprecht?—A. In 1936 you mean?

Q. Yes, in 1933.—A. No.

Q. Would it change your recollection any if the fact should be that Dr. Raspe did visit the Krebs plant shortly after the Krebs-du Pont agreement of 1933?

Mr. WHITNEY. I object to the form of the question.

The COURT. Objection sustained.

Mr. WHITNEY. He did visit the plant in 1933. It is in evidence. If he would just put in the paper instead of asking these theoretical questions—

Mr. DIXON. Obviously, your Honor, I am trying to conduct this examination to aid the Court, if possible, on what was happening.

Q. Well, I will hand you, Doctor—do you know now whether Dr. Raspe did visit the Krebs plant in 1933?—A. When you tell me it is so, it must have been so, but frankly I don't remember it. I could not remember if Dr. Raspe was over here at all in 1933.

Q. Well, I will hand you what has been marked 3018 Exhibit 290 and ask you if you recall such a visit now having been made by Dr. Raspe?

Mr. WEBSTER. Your Honor, may I interpose to ask whether that Exhibit 290 refreshes his recollection, and if it does—

The COURT. Let him look at the exhibit.

(Witness refers to exhibit.)

The COURT. Do you know that Dr. Raspe was in this country in 1933?

The WITNESS. Of course he must have been, after this letter, and he must have visited the plant.

The COURT. Now will you start from that point. The witness is now in agreement with you that Dr. Raspe was in this country and did visit the Krebs plant in 1933.

The WITNESS. But I base it on this letter, your Honor, because—

The COURT. Very well.

Q. Does this aid you in recalling at all the occasion or the reason for Dr. Raspe coming to the United States and visiting the Krebs plant, Doctor?—A. No. There would probably be no other reason than his interest in visiting—he did visit here a few times—in order to get technically educated.

Q. Do you recall when Dr. Booge visited the TG plant in Germany?—I recall that, yes. In 1937.

3019 Q. Now do you know of your own knowledge, Doctor, as to whether or not you found or had any complaints from any of the Titan associates with reference to any imports into their territories from the Krebs

Company or du Pont Company?—A. I do not know particularly the Krebs Company or the du Pont Company. There were some complaints. Not knowing where they came from I don't remember exactly whether it was from the one or the other, whether they may have been from the National Lead or from the du Pont Company.

Mr. DIXON. That is all.

The COURT. Mr. Whitney.

Cross examination by Mr. WHITNEY:

Q. Dr. Jebson, have you ever discussed what your testimony would be with me or with any other representative of du Pont whatsoever?—A. No.

Q. Yesterday afternoon his Honor ruled, I am on page 2943, that "cross examination . . . should be directed towards filling in gaps or supplying mental reservations which you think may lie behind some of the communications".

Do you know what a mental reservation is?—A. Well, how shall I define that? It is a reservation made without expressing it, isn't it?

Q. Yes. You might say one thing while having in mind possibly a slightly different shading. That would be that you reserve a mental reservation. Would that be your view of it?—A. I think so. Isn't that what you call, you cross your fingers? Isn't that the expression more or less?

Q. Yes. Of course we are construing what his Honor said. I take it "you cross your fingers" would be a popular expression of it. So, I shall cross examine in part as to whether that ever happened.

At page 2947 his Honor was questioning you about your first receipt in Europe of the news of the du Pont—A. What?

Q. About your first hearing in Europe of the du Pont-National Lead agreement.—A. The 1933 agreement?

Q. Yes. 1933. And the Court's question was: "You were very much disturbed about it?" And your answer was: "I was shocked."

And the Court's further question: "You were afraid that might cause the whole structure to topple?"

"The WITNESS. Yes."

What structure did you have in mind?—A. This structure which formed, it was the basis for, in other words the 1920 agreement and those principles, which was the basis for the cooperation technically.

Q. And then you said: "I could not understand how at that time National Lead Company could contemplate—"
 3021 plate—" and his Honor said: "Doing any such thing?"

"The Witness. Doing any such thing. I was shocked at that time."

That is to say, at that moment it was a shock to you that National Lead could even contemplate this threat of toppling of the structure of 1920; is that right?—A. Yes.

Q. Then later in the same page you report your taking that up with Mr. Beschorman in Europe and you say: "he . . . got up, very, very impatiently saying, 'But we have got to sell this agreement.'"

Now I derive from your use of the word "very" twice and the words "got to sell this agreement" two things—I would like to ask you if they are right—that Mr. Beschorman felt very strongly about it; is that right?—A. That was my impression.

Q. And, secondly, that he felt that he had to sell to the Germans something that they would not necessarily accept unless there was some selling work done, is that right?—

A. Yes. But that last part was naturally on the basis of my criticism of the situation.

Q. In other words, Mr. Beschorman had not fully understood before coming to Europe that it would have to be sold, and you explained that to him, did you?—A. Yes.

Well, what he has understood from the letters before I don't know, but anyhow that was his reaction
 3022 to my criticism of the situation.

Q. Now after you both got back to the United States and you took up the principles with him, was his answer consistently along the lines that you testified to, as follows: "Don't go into details, Dr. Jebson. You are too far a man for details"?—A. Repeatedly.

Q. Repeatedly.—A. He did that.

Q. Yesterday you said "generally," and I wanted to make sure whether that meant "repeatedly."

Then just before meeting Dr. Rupprecht you said you were "trying to get Beschorman to get Rupprecht to see the difficulties we were encountering."

Was it that you were expecting that it was Beschorman rather than you who should try to convince Rupprecht in the first instance?—A. Well, after all, I wanted him to help me in that effort, and naturally I thought his word would have more weight with Rupprecht than my word would have. After all, he was a vice-president of Na-

tional Lead Company, he had been conducting this. So, if I could get him in the matter to help me, so much the better.

Mr. WHITNEY. Your Honor, I say with great respect, I may have had a wrong impression but I had the impression that perhaps that thought did not reach your
3023 "Honor when your next question was: "Let us stop going around in circles, Doctor. You wanted to persuade Rupperecht to go along on the territorial arrangement?"

The COURT. I see what you mean. You are quite right. I did not gather the distinction which you have now drawn and I did not intend to emphasize the word "you" as you have just now read my question.

Mr. WHITNEY. I take it that what seemed like a circle was really the fact, that Mr. Beschorman, executive vice-president of National Lead, had a position with Rupperecht, as it were, and Dr. Jebson was a stranger from abroad who had never met Rupperecht.

The COURT. I didn't get that point.

Q. But you did yourself obtain an opportunity to speak to Mr. Rupperecht, didn't you?—A. Yes.

Q. So that his Honor was quite right in later asking you:

"Q. You tried to sell that kind of proposal to Mr. Rupperecht?"

That is to say, you personally had an opportunity to try to sell it to Mr. Rupperecht?—A. Well, to sell the idea of that, of the 1920 agreement, if that is what you mean with that proposed—

Q. It is his Honor's language, but I think that is what he meant.—A. Yes.

3024 Q. And then Mr. Dixon asked you: "What did

Mr. Rupperecht say to you at that time with reference to respecting the territories of the Titan associates?" And that is what we sometimes call a \$64 question, in the sense that he is asking you what Mr. Rupperecht said. Now can you add this morning to what you answered yesterday afternoon, which was as follows: "He too many answers in one way. One moment he talked about the executive committee, they would not accept that kind of thing. At another moment he said, 'You are secured against any invasion from us through your patents,' and so on. At the third time he said, 'For legal reasons.'"

And in the morning, in answer to precisely the same

question on direct examination you said:

"Well, he said that, after all, we haven't exported to these countries, you are protected by patents in these countries; how can we export? And I think the whole thing will work out to be eminently satisfactory to you."

"He talked about the non-exclusive licenses, which I didn't like at all and which I couldn't see the reason for. He said that it was a rule from the executive committee or finance committee not to part with any property entirely; they have to put it up—if he should give 3025 an exclusive license it will be tantamount to parting with the property, and he would have to put it up to the executive committee, and he thought that they are not—that the approval would not be given."

"He used that executive committee as something which he could not work up against."

Can you this morning add anything to what Mr. Rupprecht said beyond what I have read?—A. No. I think that describes the situation.

Q. As I read it, you gave more detail in the morning than in the afternoon; is that not so?—A. Pardon?

Q. As I read it, you gave more detail in the morning than you gave in the afternoon?—A. Well, I suppose my mind was considerably fresher in the morning. That is the difference.

The COURT. We will suspend for a few minutes.

(Short recess.)

3026 Mr. WHITNEY. Your Honor, we were at 2957. But I had to go back to 2900 and now I come forward again:

"Q. After the talk with Mr. Rupprecht on a question yesterday, Dr. Jehsen, you commented:

"Now, with regard to legal reasons, as was said in those letters, I couldn't take that serious."

Why was that? Mr. Rupprecht had given you legal reasons for not falling in, and you say you could not take that serious.—A. I said I did not believe him. Well, it comes to the same thing. Well, after all, when a man puts forward three or four different things and they are contrary to what was arranged between the National Lead Company and the European companies, because after all they had been accepted over here, you could not ask me to take it serious.

Q. In other words, you had understood that the 1920 structure was legal under American law, had you?—A. Yes.

Q. And therefore when Mr. Rupprecht gave you that reason you thought that that was an ill-founded reason, did you?—A. I thought he was trying to put forward an excuse to stop me.

Q. Then your next sentence yesterday was:

"With regard to the other things, I found it very difficult to take those serious too;"

3027 Did the fact that you knew in your own mind that Mr. Rupprecht's legal explanation was an unsound one, prompt you to believe that his other explanations were made up or fabricated?—A. Yes. With the "other explanation" I suppose you refer to the Executive Committee?

Q. Yes.—A. To me—

Q. And patents.—A. Well, naturally, where the patent protection was concerned, I mean I could use my own judgment and that was yesterday so far, but when you come to the Executive Committee, that seemed to me to be just an excuse. I thought that the thing was important enough to get the executive committee to accept the matter, I thought it was a very highhanded way and I think I even wrote Mr. Beschorman at one time too about this mentioning of the executive committee and about the manner Rupprecht dealt with these matters; that the negotiations ought to be with the executive committee then if there were higher interests which we could not touch.

Q. Your next sentence was:

"but at the same time my impression was that he had a desire of trying to fall in in some way." I believe his Honor expressed that this morning as that you felt reassured to some extent, is that right?—A. I think that is about the situation.

Q. Did you feel somewhat relieved?—A. With 3028 some doubt to be quite frank, at the same time.

Q. Relieved with doubt?—A. Yes. I mean I could not say I was entirely relieved. There was a certain vibration in my mind, so to say.

Q. Was that the thought that you carried back to Germany, to Europe?—A. Yes, or, to put it somewhat different, I was not entirely happy about it but I thought we would have to take a chance.

Q. This was in the summer of 1933?—A. Yes.

Q. Now, in October of 1933, there is in evidence a letter written by you, Plaintiff's Exhibit 288, from which I read this:

"I was in Frankfort the day Germany denounced their membership in the League of Nations, and Hitler published his manifest and his speech. It will interest you that the public was very calm and there were no demonstrations in this connection. From Germans I gather that the general sentiment was a relief that the situation now was made clear and they were generally in hope that this would bring the disarmament question to a final settlement."

Was that the same sort of relief that you were feeling contemporaneously about Mr. Rupprecht?—A. Well, I don't get quite the parallel so far.

Q. Then you went on yesterday in speaking about 3029 Mr. Rupprecht:

"And he was trying to paint a picture . . . that there wasn't anything to be feared."

A. There wasn't anything to be?

Q. Feared.—A. Feared? I see.

Q. Is it fair to say that Mr. Rupprecht at all events was trying to reassure you? It is one thing as to whether you were reassured. It might be a different thing as to whether Mr. Rupprecht is trying to reassure you. I am now asking the second.—A. I think you will note from various of this correspondence that I steadily came back and tried to get Rupprecht in line and did not get him in line.

Q. But he was trying to be friendly and reassuring toward you?—A. Yes.

Q. To give you relief.—A. Yes—well, not give relief, but to try to relieve my mind.

Q. To relieve your mind.—A. Yes.

Q. And you were trying to get him down to sounder things?—A. No, from sound to things. All of us, get down to a matter of fact instead of talking.

Q. Perhaps my analogy to Mr. Hitler was not so remote. We did get down from sound to things.—A. Yes.

Q. Now then you said:

"I just wrote a few words to Kuhne and Weber 3030 Andre trying to transfer that opinion, convey that opinion," and in the morning you had said, "convey that impression."

The impression or opinion that you sought to convey was the impression of being reassured, is that right?—A. It was the impression of we should take the chance. You see what I mean?

Q. Yes. And that is the question I believe that the Court asked you on the next page, when he says:

“Q. But when you left that meeting, Doctor, were you satisfied by what Mr. Rupprecht had said to you that he would see that Krebs would respect the territories of the Titan companies,” and you said “If you mean satisfied, that I felt happy about the thing, no.”

Now you did not feel happy about the thing, did you?

—A. No.

Q. But your duty to National Lead made you feel that you ought to do what you could to make Kuhne and Weber Andreae feel happy about the thing?—A. To give the approval to sign this agreement.

Q. And would you not go as far as to say you wanted them also to feel happy about it?—A. I think there I would like to take a neutral attitude.

Q. You yourself would like to take a neutral attitude.

—A. Yes.

3031 Q. What attitude would you like them to take?

—A. Well, as a business man, as a representative of the National Lead Company, of course it was my duty to try to get them to feel happy, but at the same time I did not want to take more responsibility than absolutely necessary.

Q. Right. In other words, your duty might cause you to wish to convey some impression or opinion to them. You did not feel that your duty was to give them a precise analysis of what you really thought?—A. No. I left that to them, and personally I think they knew what they did when they wrote back their letter. Their position was, as far as I understand, always, without having talked with them, but I am just reasoning, but from my talk in Frankfurt before I went over, that they wanted to accommodate the National Lead Company.

Q. They, like you, wanted to accommodate the National Lead Company?—A. To accommodate the National Lead Company.

Q. Then his Honor asked you:

“In other words, you did not really anticipate any further trouble?” And you answered: “No; or, rather, I was hoping that as time developed I might be able to get him to understand and sooner or later fall in line.”

Do I understand that it would not be true that you did not really anticipate any further trouble? Perhaps I had better put it more directly: you feared further
3032 trouble, did you not, or you were in doubt?—A. I felt uncertain about the future. I had not got as clear a basis as it was desirable to have vis-a-vis the Ger-

mans and vis-a-vis the whole thing. I mean in order to get—in other words, I wanted to get them down to the 1920 agreement but I could not get them.

Q. I think I am clear. You spoke in the morning of Mr. Rupprecht as slippery?—A. Yes.

Q. And in the afternoon you spoke of him as elusive.
—A. Yes.

Q. And therefore would it not be fair to say that Mr. Rupprecht left you in doubt?—A. Yes, in my mind that is perfectly true.

Q. I just want to go over this again to get the connections. His Honor's question was "In other words, you did not really anticipate any further trouble?—A. No; or, rather, I was hoping that as time developed I might be able to get him to understand and sooner or later fall in line."

And then his Honor's next question:

"And go a little further?" I take it his Honor meant, Well, assuming that your answer to my first question had been "Yes," that you did not really anticipate any further trouble, what you wanted was to get Rupprecht to go further than he had yet gone, and
3033 your answer was, "It was a matter to me of further development."

Do you recall that? "It was a matter to me of further development." That is what you said to the Court yesterday.—A. (No answer.)

Q. Perhaps I can help you by going on:

"I was dealing with a situation where my impression was that Beschorman did not really understand this agreement either. I mean the 1920 agreement, or the consequence of it."

Did you mean to say that the hope was conveyed to you that you would have to further develop the opportunity to get Rupprecht to accept the sound principles?—A. Yes.

Q. And then you say, "I say, as I said, I felt I was lost practically at that time." Now to me that means that you were not reassured; you were lost at that time.
—A. Yes. It is the same over again.

Q. Then passing two pages later Mr. Dixon asked you: "Well, of course, the Germans didn't get all they wanted in the letter that they sent, did they?" and you answered: "No, but I was not a representative of the Germans."

Was it true that the Germans knew you were a representative of National Lead?—A. Oh, certainly.

Q. And that the Germans knew that you were
3034 free, as any business man is free, to try to present
to them the National Lead viewpoint?—A. Cer-
tainly.

Q. Mr. Dixon's next question is:

"Were you satisfied when you left the meeting with respect to the action of Krebs in respecting the territorial limits of the Titan companies?"

Your answer is short, it is in three words: "I was hoping." You were doubtful, but hoping?—A. Yes, yes.

Q. Doubtful but hoping, is that a fair summary?—A. No, I didn't quite hear what came before "I was hoping."

Q. I will just reread it. It is a question by Mr. Dixon.

"Were you satisfied when you left the meeting with respect to the action of Krebs in respecting the territorial limits of the Titan companies?—A. I was hoping."

A. That is perfectly correct.

Q. Now over a few pages later Mr. Dixon says:

"And did Mr. Rupprecht indicate to you that he understood those conditions?"—being these 1920 conditions—
"A. Well, he was always very evasive.

"Q. Well, were you satisfied that he understood?—A. No."

Now you have told us that you understood Mr. Rupprecht in such a way that you were left lost, in
3035 doubt, although hoping for further development.

Now this is the converse question that Mr. Dixon is asking you,

"How did you understand that you left Mr. Rupprecht?" Did Mr. Rupprecht understand the principles of 1920. Had you succeeded in carrying to Mr. Rupprecht an understanding of the principles of 1920?—A. This I do not know, because as I said, he was very evasive in the matter.

Q. You could not tell whether you had succeeded or not?—A. No.

Q. And then you say later, "My general impression from that time was that I was very dissatisfied really with the situation as it was." Do you adhere to that?—A. Yes.

Q. Now his Honor was quite understandable, because unlike you with the Germans, and unlike me, he has to bear a responsibility, so he was quite understandably anxious to try to get some more precise answer, and the question was this—A. Who is this you are talking about?

Q. The Court. (Reading:)

"Now what I want you to tell me is, at the time you wrote those words did you feel or did you not that you were making an accurate comparison that the views expressed by Mr. Beschorman as to future cooperation were also the views expressed by Mr. Rupprecht as to future cooperation. I want you to tell me as truthfully as you can recall whether that paragraph did represent your then state of mind."

And your answer was:

"I can only express what I may call what I feel about it, and that is that it was in general terms, talking about it without going exactly in one way or the other. If you look back at it, I felt at that time, I felt that I was in a very difficult position,"—and I want to pause there. Is it true to say that when you wrote those letters you were not trying to make an accurate representation of anything—and you know what "accurate" means?—A. Yes, sir. No, I was not trying to do that, but I was—

Q. It was not a question with you of truth or the opposite, as if you were on oath in a courtroom, was it?—A. No.

Q. It was a question of being a representative of National Lead, a man who had an investment in Titan, Inc., a man who had relations with the Germans, to try to put things in the aspect best suited to sustain your hope for future development, is that right?—A. Certainly.

Q. And the difficult position was that necessarily you had to take one view as a representative of National Lead and appreciate that the Germans must take a different view, isn't that true?—A. I don't quite get that.

Q. What made the position difficult for you? Was it the conflict between the German company and the National Lead view?—A. Yes, and it was a conflict between—after all, we were asking the Germans to accept the position or relationship with du Pont which was very different from the relations that we had, the basic principles that we had presented to them in 1927.

Q. And did that put upon you the necessity of trying, in effect, to reassure the Germans while you were not yourself personally fully reassured in your spirit?—A. Yes, or rather to try—it put me in the necessity to try to get the Germans to accept something which I did not like—I mean personally. You see what I mean?

Q. Yes, I do. Now you went on and said:—A. But

at the same time I thought we should take the chance. You see what I mean. In other words, when I say that, we had not gotten down from sound to things—the thing was too indefinite in certain respects, if you understand what I mean?

Q. Yes, but you see the language of the letter to the Germans was rather interesting, the two letters to Kuhne and Weber-Andreae were in identical language and they were both very short. First, it is not your habit on vitally important matters to write very short letters, is it, 3038 when you are trying to sell an important thing?—A. (Witness laughs.)

Q. Or explain an important thing.—A. You are not the first to accuse me of that.

Q. Well, it is the other way around. I rather think I see a meaning in it. Wasn't this an uncomfortable letter for you to write?—A. Yes.

Q. And you said "I have met Mr. Rupprecht, president of Krebs Pigment and Color Corporation, who verbally has expressed to me the same views as to the future co-operation as has been expressed by Mr. Beschorman." Considering the "views and interpretations as expressed by Mr. Beschorman," what do you mean by "views"? Point of view? Attitude?—A. This was a very hot day in July, Mr. Whitney, so I do not know. I do not think I examined every word in the way you are trying to do it now.

Q. "And considering the views and interpretations as expressed by Mr. Beschorman and by Mr. Rupprecht in his letter to Mr. Beschorman," that is falling back on the actual Rupprecht letter, isn't it?—A. It comes to what I said before. It comes to falling back on Rupprecht and Beschorman on that matter.

Q. "It seems to me that a cooperation can be looked to." That would be in the future, wouldn't it?—

A. Yes.

3039 Q. "which will be of important benefit." When you just said you were falling back on Rupprecht and Beschorman, did you mean that you were not wanting to take responsibility of your own in the matter?—A. I repeatedly said that.

Q. That you were just wishing the Germans to get their reassurance, if they could get it, from Mr. Beschorman's and Mr. Rupprecht's letters?—A. Yes.

Q. And you were not going to add to them independent views of your own?—A. No.

Q. Or independent support of your own.—A. Except saying, "Well, as far as I am concerned, I think the best thing to do is to go ahead and take a chance in the matter."

Q. Right. And these men were personally well known to you, weren't they; both Kuhne and Weber Andreae—A. Yes.

Q. And when you wished to take your own responsibility in the matter they were quite different characters, were they not, Weber Andreae and Kuhne—different types of men?—A. Yes.

Q. If you were taking your own responsibility would you write a letter identically verbatim to both men?—A. Who can remember that at that time?

Q. Would you any time write to two different types of men in an important matter, would you write in identical phrases?—A. Probably not. I would try to treat
3040 each one according to their character.

Q. Just so. But this was an unpleasant, uncomfortable duty you had to perform to write them?—A. That is right.

Q. One of the reasons that it was unpleasant was that you were not sure yourself, you were in doubt?—A. If it had been left to me to decide what the National Lead Company should do, I would not have made that agreement—I mean the agreement of 1933.

Q. So then going back to the testimony, "So, my intention was to put the responsibility on Beschorman and National Lead as much as possible. You see what I mean?" That was the important thing with you, wasn't it, that National Lead and Beschorman did this and had their own reason for doing it, and they were to carry the responsibility.—A. Yes.

Q. But it was not the point that at that moment he wanted to pursue, because he says "I understand all that. But you did say in your letter that the views expressed in Mr. Beschorman's letter, 'as to the future cooperation' are the same views which were verbally expressed to you by Mr. Rupprecht," and the next question says, "Was that the truth?" and you answered, "I hope so, but I can't recall."—A. Yes.

3040-A Q. That was late in the afternoon, and as you say, you were a little bit tired. This morning you have said that the truth was that you hoped that that would turn out to be so. That is the same thing you meant yesterday afternoon, isn't it, when you said "I hope so" in answer to his Honor's question; not "I hope that was the truth"

but "I then hoped it would turn out to be the truth."—A.

Yes. I mean there is a difference there.

3041 Q. And what would you say was right as to the word "hope"?—A. Well, that is too—I mean, it depends upon the connection. If I got you right, in the one case I am talking about what I hope will be the result in the developments, isn't that so?

Q. Yes.—A. In the other case it was a question of whether I said "I hope so whether I conceive the truth or not."

The COURT. You hope generally you are a truth-telling citizen?

The WITNESS. Yes.

Q. It does not go further than that?—A. No.

Q. Finally the question of his Honor is: "You did not intend to tell other than the truth when you wrote your letter of July 21st?" And your answer was: "No. I would not say that."

Now what would you say about what you intended to tell in your letter of July 21st?—A. Isn't that the same as I said several times, that as far as I am concerned I am willing to go ahead and take the chance in the matter?

Q. In other words, to sum it all up, when you, as a business man in this difficult position, as you called it, between these two points of views were writing to the Germans, it was not a simple question of truth or falsity, was it, but it was a question of accomplishing a business
3042 objective: putting off the evil day while in doubt but still in-hope and planning for future developments, is that right?—A. Quite right. To put it more explicit, hoping that as years went on, as one got to know each other better we will get the du Pont Company in line.

Q. Right. Now I am leaving that. Years did go on, and eventually you came over to America in the summer of 1938 particularly in relation to this precise subject, did you not; that is to say, the relationship with Krebs?—A. Well, incidentally that was taken up. I don't remember that that was one of the specific purposes of my coming over.

Q. Now when Mr. Dixon was examining you about that you said, "At the time really I was very dissatisfied with the development of the relations with du Pont." That was a correct reflection of your view at the time of that coming to America?—A. Pardon me?

Q. Were you, when you came to America in 1938, very

dissatisfied with the development of the relations with du Pont?—A. I certainly was.

Q. Now you arranged to make a trip to Wilmington; did you not, to see Mr. Rupprecht?—A. Yes.

Q. And you had Mr. Kaegbehn with you?—A. Yes.

Q. And Mr. Hancock was there?—A. Yes.

Q. And then thereafter did you go to lunch with
3043 some of the other du Pont officials? A. Yes, with Dr. Sparre. I recollect him.

Q. He was the head of the development department?—
A. Yes.

Q. And a high official of the du Pont Company, was he?—
A. Yes.

Q. And a Norwegian by origin?—A. Yes.

Q. Or at least a Scandinavian?—A. No. He was a Norwegian. I was very interest in meeting him because we had acquaintances and friends in common.

Q. Sparre is an old Swedish name that cross the border line, wasn't it?—A. Yes, very much so.

Q. Will you give us the best of your recollection of what was said as between you and Mr. Rupprecht in the morning and as to what was said at the luncheon? You were not asked that yesterday. You were asked a great many other things, but I would like to do what you call take a chance.—A. The talk without question was more or less repetition of what du Ponts said several times. There is a memorandum which recorded what I—

Q. Will you forgive me. I want you to try to tell us, as you sit there this morning, throwing your mind back, and I think his Honor would be willing to give you a minute or two to try to remember what you now remember may or may not have been said, even if it is just scraps.—

3044 A. If you take exactly what I remember now, that is from the meeting itself with Rupprecht and lunch, there is very little in my memory left, because it was of the same character as the previous ones. You never got to the grip of things. I had one object particularly in mind and that was the following: During the years that had passed when we negotiated these license agreements, it was a very tedious thing for me. Things were negotiated with Kaegbehn over here and everytime Mr. Hancock got something in his mind, I believe it was Hancock or somebody down there,—he wanted to change some of those agreements and Kaegbehn wrote over to me if he was not able to talk Hancock out of it, and I was not in a position to say "yes" or "no". I had to go back to the

Germans and the English, in view of the 1920 agreement. It made the whole thing a very tiresome process, and what I wanted was to get some kind of an understanding or agreement on a standard form for license agreements if and when such were to be exchanged, to make it clear to Rupprecht and Hancock we could not go on with this eternal and tedious correspondence about these matters, and I wanted to have left that clearly into their minds. Naturally at the same time I discussed the matter in general again, as I had done before, trying to enforce the principles, or rather to get them—enforce is not the
3045 right word—but to try to get Rupprecht into line again—not again, because he had never been in line.

Q. You mean try again?—A. Yes, try again to get him in line and there was that same—in other words the same kind of evasions. If I remember right when I left I thought we had got Rupprecht and Hancock to accept this idea of trying to standardize this license agreement form if and when we agreed upon licenses, but I think the following correspondence did not bear that out—as usual with Rupprecht.

Q. Perhaps we are getting a little away now, because the thing I want you to remember is about what was said. Do you remember about the lunch?—A. Then we had lunch. We did not talk business during the lunch, but leaving, and going down the elevator, there is one thing which I remember very distinctly because it shocked me. It gave me a little shot, so to say. I said to Dr. Sparre in the elevator that what I am aiming at, Dr. Sparre, is to get as close cooperation as possible between du Pont and our companies,” and he said, “Not too close, Dr. Jebson; not too close.” And I was puzzled somewhat at the same time about it. But that was all, and I left to take the train.

Q. Did you see Dr. Sparre or Rupprecht again on that visit?—A. I have never seen Sparre since then.
3046 I may have seen Rupprecht since that visit.

Mr. WHITNEY. Thank you.

Mr. WEBSTER. No redirect.

Recross examination by Mr. DIXON:

Q. Dr. Jebson, you are very precise in your manner and habits, are you not?—A. Well—

Q. That is to say, you like things—A. Don't ask me.

Q. You like things to be precise?—A. Yes.

Q. Is that correct?—A. Yes.

Q. And you did not like any deviations from, well, say the 1920 agreement?—A. Yes.

Q. And all of the companies associated with the Titan groups under the 1920 agreement entered into written agreements with each other under your 1920 agreement form, did they?—A. You mean the European associates?

Q. Yes—A. Yes.

Q. And of course that would be National Lead during the Titanium Pigment Company originally, and then—A. Titan Company, Inc.

Q. Yes, and so all of the associated companies were committed by written agreement to follow the general principles, as you have called them, of cooperation set forth in detail and at length in the 1920 agreement? That is a fact, isn't it?—A. I did not get the first part of it.

Excuse me.

3047 Q. (Read.)—A. Yes. In other words, Article XIV?

Q. Yes.—A. Yes.

Q. And you did not want anything that was not in writing that might deviate from the general principles of that agreement or from any of the other provisions of the agreement, did you, Doctor? In other words, you wanted it to be precise?—A. I do not quite get your question.

Q. When you discussed the 1933 agreement with Mr. Rupprecht I believe you testified generally that he told you that he could not become a party to the 1920 agreement, is that correct?—A. No. I don't think that is correct, because I did not—we had only talked—I talked about the principles there. I never showed him, for instance, the 1920 agreement.

Q. Well, did he say to you that he could not make any agreement in writing of any kind with the Titan Company?

—A. I do not think he said he could not make any agreement of any kind but he evidently did not want to make any agreement.

Q. What you wanted in your discussions with Mr. Rupprecht was, if possible, a written agreement between Krebs and the Titanium Pigment Company which would be like the agreements that the other companies made with the associated companies? That is what you really wanted, wasn't it, Doctor?—A. I wanted an agreement with

3048 du Pont Company respecting Article XIV of the 1920 agreement.

Q. You wanted it in writing, didn't you?—A. Certainly. If you could not get it in writing what would it be worth?

Q. If it were possible to get it. And it would have been a matter of considerable concern to you that such a written agreement could not be made by Krebs? Was that not a fact?—A. But why say that "Such an agreement could not be made." We did not get anywhere anyhow, whether written or otherwise.

3049 Q. Did not Mr. Rupprecht say to you, or didn't he, that he could not make any written agreement with your company such as the other companies had—A. I do not think he specified "written" in that connection.

Q. So that you did not even get to a point of talking about a written agreement such as the other companies had, complying with the 1920 agreement?—A. No.

Q. Now you did, however; testify that after these conferences, or after this conference—there was only one, that is correct, isn't it?

The COURT. In 1933?

Mr. DIXON. In 1933 with Mr. Rupprecht—

A. Yes.

Q. —that you were satisfied that the cooperation would be eminently satisfactory, or words to that effect, between the du Pont Company and the foreign associates?

—A. I would not say I was satisfied.

Q. Now, Doctor, let me ask you this very fair question—

Mr. WHITNEY. I object to that, your Honor.

The COURT. He recommends it.

Q. When you testified you were not satisfied you meant that you had to take a chance that perhaps Krebs would not live up to these assurances which Mr. Rupprecht gave you orally at this meeting? That is what you were dissatisfied about, isn't it?—A. No. I don't think that

3050 is quite the expression. First of all, I cannot remember when you talk about the oral things, and I think when I say I was dissatisfied it was because there was nothing more to really hold onto than this agreement between the National Lead Company and the du Pont Company. All the rest was—

Q. And these assurances which Mr. Rupprecht gave you at this meeting that everything would be all right for the foreign associates—in other words— A. No, I don't think you can say everything would be all right. What does that mean, Mr. Dixon?

Q. Well, as you put it in one of your letters, "It seems to me that a cooperation can be looked to which will be of important benefit to TG". In other words, Doctor, you did not like an oral arrangement, did you, or oral assurances from Mr. Rupprecht because you felt he was rather slippery and hard to pin down, is that right?—A. He was hard to pin down to the 1920 principles.

Q. And you would have been much more satisfied if he had come out and made a written agreement or put something a little more definitely in writing at this meeting, isn't that a fact?

Mr. WEBSTER. Your Honor, the objection is the questions are argumentative.

The COURT. I will let him go a reasonable distance.

3051 Mr. DIXON. That is all I ask, your Honor.

The COURT. Go ahead.

(Question read.)

A. Do you mean when you say "an agreement"—

Q. Do you understand my last question?—A. Please repeat?

(Question read.)

A. Does that not assume that there was an oral—

Q. That you were assured, Doctor, by Mr. Rupprecht.—

A. Assured of what?

Q. That everything would be eminently satisfactory to yourself.—A. And that could mean compensation in one way or another; in some way we would get a benefit.

The COURT. In your mind the one problem was territorial limitations?

The WITNESS. Rupprecht had emphasized the patent situation and having licenses under those patents.

Q. He had also written this letter to Mr. Beschorman, that is on June 28th, in which he said, "Well, we cannot export or sell outside the territory specified in the 1933 agreement", hadn't he?—A. I think so, yes.

Mr. WHITNEY. Well, just wait a minute until we look at that letter. I would like to check it. What is the exhibit number?

Mr. DIXON. 267.

3052 (Question read.)

Mr. WHITNEY. Your Honor, I think if he is going to cross-examine the witness on an exhibit he should show him the exhibit. My objection is it misrepresents it. It says, "As you are aware, the antitrust laws of this country definitely prevent this corporation from mak-

ing any commitments respecting the territories of Titan-gesellschaft."

Mr. DIXON. If the Court please, I ask that my question and answer stand. The witness has answered my question.

The COURT. All right.

Mr. WHITNEY. I object to the question and move to strike out the answer on the ground that it misrepresented an exhibit in evidence.

The COURT. Very well. Motion granted. If you want to call his attention to specific language in the exhibit you may do so.

(Previous question and answer re-read.)

Q. Well, you have seen this letter, I believe, from Mr. Rupprecht to Mr. Beschorman of June 28th, hadn't you, Doctor, before you conferred with him?

The COURT. You have been all through this before.

Mr. DIXON. I understand, Judge, but the question was objected to.

The COURT. We were all through it yesterday.
3053 - A. Yes.

Q. Did you have any discussion with Mr. Rupprecht about Article II of the Krebs-Titanium Pigment Company proposed agreement?—A. What does Article II say?

Q. I hand you the letter to refresh our recollection (handing).—A. Have you got the Article II itself?

Q. Yes. If you would like to read it. I do not know as it would help you.—A. I cannot remember that we discussed these things in detail in that conference with Rupprecht at all. I think I said that yesterday, too.

Q. Now, Doctor, you testified under cross-examination from Mr. Whitney that you were dissatisfied after this conference. As I understand your testimony you were dissatisfied because you wanted, first, if possible, Krebs to come in 100 per cent under the 1920 agreement which this did not do? That is correct, isn't it?—A. Yes.

Q. And, second, you wanted something that you could indicate to your associates abroad, BTP and Titan-gesellschaft, or what TG wanted with respect to the territories of TG, that they would be respected by Krebs? You wanted that?—A. I would have liked to have got it.

Q. And you got the letter or saw the letter that Mr. Rupprecht had written to Mr. Beschorman with reference to that before you went to the meeting with Rupprecht, didn't you?—A. Probably so, yes. I suppose.

3054 Q. And were you satisfied with what he said about territories in that letter before you went to the Rupperecht meeting?—A. Well, I cannot remember what happened or how I felt about it at that time.

Q. Well, if you were not satisfied with it, having seen the letter, now can you state to the Court in what respects you were not satisfied on that point?—A. No, I can't. The only thing which I can state in that respect was that it was strongly pointed out that as long as du Pont was working under licenses from the National Lead Company, under licenses under the patents, the same patents as we had abroad—when I say "we" I mean the Germans and English and the various companies—that they could not very well send over any material to those countries. We had the patent protection—

Q. Well, there were countries in which you did not have patents, were there not, Doctor?—A. Yes, but they were not of too much importance.

Q. In what respects? Getting back to my question were you not satisfied when you went away from the meeting with Mr. Rupperecht with respect to the territorial part of your 1920 agreement or were you satisfied on that point in so far as oral assurances could be given you?—

A. I cannot remember there were given any additional oral assurances; additional and beyond what I have

3055 said here with regard to the patent situation.

Q. Then the thing which you were not satisfied with after you left this conference with Mr. Rupperecht was that there would not be an automatic exchange of patents between Krebs and the Titan Company? Is that one of the things you were not satisfied with?—A. That there would not be an automatic exchange?

Q. Of patents and applications between Krebs and the Titan companies.—A. Yes, that was one thing.

Q. And that was one of the things which was made a matter of negotiation in the 1933 Krebs agreement, wasn't it? It was left open?—A. It was left open, and therefore—

Q. And was that one of the things that you wanted to bring Mr. Rupperecht in line with, the 1920 agreement, when you had your conference with him?—A. I was afraid.—

Q. Can you answer that question?—A. I wanted to bring him in line, yes.

Q. On that point, namely the exchange of patents between your companies?—A. Yes.

Q. And Krebs?—A. Yes.

Q. And in that respect you were not satisfied by your conferences with Mr. Rupprecht?—A. No.

Q. Now what about the technical exchange provided for in the 1920 agreement? Were you satisfied on that after you left Mr. Rupprecht's office or conference?—

A. No.

3056 Q. But there was an exchange, or at least visits made after this meeting?—A. Yes.

Q. Between Titan and Krebs. Now what more than that would you want that you were not satisfied of after you left Mr. Rupprecht at this meeting?—A. Particularly with regard to this exchange of licenses. I was afraid somewhat that there would be a question of compensation, in cash.

The COURT. Royalties?

The WITNESS. Royalties or whatever it was. He had said only outstanding patents, outstanding inventions patented should be a subject of royalties or of compensation. But I was somewhat in doubt as to what could be considered outstanding patents, outstanding inventions.

Mr. WEBSTER. Your Honor, Mr. Dixon is trying to force the witness to a point where he breaks in on practically every answer. I think he should be allowed to answer.

The COURT. Do you feel you are being given ample opportunity to answer?

The WITNESS. Yes, but the interruptions are somewhat—

The COURT. All right. I will ask Mr. Dixon to give the witness a chance.

Mr. DIXON. I thought I was.

The COURT. I thought so, too.

3057 The WITNESS. If I may continue explaining that situation?

Mr. DIXON. I did not interrupt. Go on, Doctor.

Mr. WHITNEY. You are interrupting now.

A. (Continuing) As I say, what are outstanding inventions? That was left open. And later on I had a disappointment in that respect.

The COURT. Do you want him to go into that? If you want to, you can stop him.

Mr. DIXON. No.

The COURT. All right.

Q. So that was one of the matters, that if the Krebs Company had been brought in line, as you call it, with the

1920 agreement you would have been satisfied with it, is that correct?—A. Yes, if they were both in line.

Q. So when you say that you were dissatisfied and hoped to bring du Pont in line, you mean you wanted them to come in, 100 per cent, with all of the obligations of the 1920 agreement? That is what you wanted, didn't you, Doctor?—A. Yes.

Q. And that was what you hoped to get from Mr. Rupperecht when you had this conference with him in July of 1933?—A. Well, I would not say my hope went quite so far, but I was hoping to get him somewhere anyhow in that direction.

Q. So there were still some matters that, under 3058 the 1920 agreement, such as exchange of patents between the parties, was not closed after you left the Rupperecht meeting in 1933?—A. It was not solved to my satisfaction.

Q. And you had to wait until 1938 before you got an exchange of patents between Titan Company and the du Pont Company as you would have gotten them ordinarily under the 1920 agreement?—A. Well, I did not get it in 1938 either.

Q. Mr. Whitney has asked you about the 1938 meeting with Mr. Rupperecht. At that meeting I think you testified that you wanted to work out a general arrangement, is that correct, to handle the exchange of the patents between Titan companies and du Pont?—A. No. I did not say a general arrangement. I said to work out a standard form in the case there was an exchange of patents.

Q. In other words, you were dissatisfied again about the arrangements then in effect whereby Mr. Kaegbehn and you had to conduct extensive correspondence between Titan and the Titan companies about the patents and patent applications of Krebs? That is what you were dissatisfied with?—A. I had to go every time to the Germans and to the English and to the French and get their approval for anything which might drop into the head of Mr. Hancock.

Q. That is right, but you did not like that because it was a lot of extra work for you?—A. Yes. And it seemed to me unnecessary work.

3059 Q. And after your meeting with Mr. Rupperecht in 1938 that was worked out, was it not, so that the patent applications of du Pont Company were forwarded regularly to the Titan companies to see whether they wanted to take out patents in their territories on the du

Pont patents?—A. No, pardon me. There you are coming onto something different, because there you are talking about patent applications, and not the question of the conditions of the license agreement—what comes in there is a matter of exchange of information regarding possible patents. That is a different thing.

Q. I understand. But I am talking, Doctor, about the exchange of patent applications between du Pont on the one hand and the Titan companies on the other.—A. Well, I thought we were talking about the standardization of licenses and license agreements and—

Q. All right. Just a moment. I will go back to the technical information. You were not satisfied on the exchange of technical information between the parties after you left Mr. Ruppacht, were you?—A. No. That is a different question and that part of it, keep in mind, there the intention was, the rule was, it should go through the National Lead Company, so it was a matter between the National Lead Company and du Pont Company—this arrangement.

3060 Q. In other words, being a man of precise characteristics, you wanted the methods of exchanging that information to be exact so that you could tell all of your associated companies how it would work out?—A. I don't remember. It didn't interest me so much, this question of exchange of information, at that time.

Q. You mean at what time?—A. In this 1938—

Q. 1938?—A. At that meeting. We are talking about that meeting, I understand.

The COURT. We are talking about the 1938 meeting at Wilmington.

The WITNESS. Yes. And the question of technical exchange was a matter between the National Lead Company and du Pont. There was one incident which came up there. I think Dr. Booge wanted some particular information. It happened when I was down there, but I can't remember that we worked out any different rules there. The thing had become rather complicated because in 1937, that was the year before, when Dr. Booge was over in Europe, he talked about certain arrangements which had been made between the National Lead Company and du Pont as to exchange of information, of which I was not informed. And I wrote about it to National Lead Company—I am telling you this with a certain amount of reservation, that, in the details it may not be entirely exact; but the main point was that the exchange of technical information was to go between

du Pont and National Lead Company. That some could go on a personal visit.—That is natural. After all, you get together then and if the chemists get together and exchange. That is a different thing.

Q. I think we understand now, Doctor, but—A. But my purpose was, one thing I had in mind which I remember very strongly, was to get these license agreements, when it comes to license agreements,—to get the form of those standardized.

Q. In other words, you would have liked to have had a general provision in a written contract which would obligate Krebs to give to Titan their patents and Titan to give to Krebs their patents, the same as all the other companies had—A. No, not at that time.

Q. (Continuing) —in the 1920 agreement?—A. No, not at that time. We had—pardon me. Not at that time. We were working under the 1933 agreement where we had the first call. Naturally, if I could have obtained others, so much the better. But that didn't come up, because that was more or less what you call buried.

Q. Well, that was one of the things you were dissatisfied with—A. Yes, but I don't think we took that up at that time.

Q. You stated that you were dissatisfied with
3062 your relations, that is the Titan Company's relations, with du Pont in 1938, when Mr. Whitney examined you. Now, were you dissatisfied with them on account of the technical exchange principle?—A. No, not particularly on that part of it.

Q. Will you state to the Court precisely, if you can, in what respect you were dissatisfied with your Titan-Krebs relationship in 1938?—A. In principle I was of course dissatisfied as long as I could not get my 1920 agreement principles accepted. That is one thing. And another thing is what especially occupied my mind in 1938 when I was down there, and what made the relations unpleasant as far as I was concerned, was the very tedious work which developed each time we had agreed to make—to exchange licenses.

Q. Well, had Krebs ever broken the frontiers of the titanium empire outside of the Western Hemisphere from 1933 to 1938?

Mr. WEBSTER. I object. I think we have been all over this a number of times.

The COURT. Objection sustained.

Mr. DIXON. No. We are trying to find out what he was dissatisfied with.

Mr. WHITNEY. Why don't you ask him in so many words.

Mr. DIXON. I will conduct the examination.

3063 The WITNESS. I think I have told that many times.

The COURT. I would like to ask you to expedite your cross-examination, but go ahead.

The WITNESS. I think I have been very explicit, Mr. Dixon.

Q. Well, in any event had the du Pont Company or Krebs ever exported into the territories of the Titan companies to your knowledge?—A. You asked me about that before once, and I answered you too. I said there had been some importation here and there, a little bit. I don't know whether it was ascribed to the du Pont or to the National Lead Company.

The COURT. But as far as you know, du Pont did not engage in a policy or practice of exporting to markets of the European associates?

The WITNESS. No.

The COURT. We know that.

Q. So that from that point you were not dissatisfied, for that was one of the principles of the 1920 agreement; isn't that the fact?—A. Yes, but there was no—I was satisfied up to that time.

Q. Up to that time that principle— A. Up to that time the chance we had taken had proven to be justified.

Q. In other words, up to 1938 this risk that you didn't want to take in 1933 had proved justified?—A. I
3664 took it in 1933.

Q. Yes.—A. I took the risk.

Q. And the 1939 meeting with Mr. Rupperecht then, as you have testified, was not with reference to any dissatisfaction on your fundamental principle of the 1920 agreement, was it, Doctor?—A. I don't think that subject matter was taken up, if I remember.

Q. There was no occasion to discuss it?

Mr. WEBSTER. Your Honor,—

Mr. WHITNEY. Let him answer it. There was no occasion to discuss the—

The COURT. Just a minute.

Mr. WHITNEY. Well, let the question be read.

The COURT. All right. But we can only have one counsel on the floor at a time.

The WITNESS. Three, weren't there?

The COURT. The question is!

(Last question read.)

The WITNESS. There was no—that is, no occasion, what I said—

(Last two questions read.)

Mr. DIXON. I will withdraw the question.

The COURT. I think he changed the word "that" to "the" and that is what changed the effect of the question.

The substance of the question was whether there was any occasion to consider the territorial problems at the 1938 conference.

The WITNESS. I was rather amazed what you had put down there, because it didn't seem to—

The COURT. He changed the word "that" to "the". It was changed from "that" to "the," meaning "the territorial"—

The WITNESS. Yes, but I did not talk about the general principle—

The COURT. That general principle, instead of the general principles.

The WITNESS. That—general principles of territorial. No special occasion.

Q. No occasion at that time to be dissatisfied with respect to any chance that you took with Krebs on that principle.

The COURT. Objection sustained. I think we have covered that four or five times.

Q. Now, just one more question. When you wrote the letter of July 21, 1933, to Weber Andreae— A. On July 21, 1933, I see.

Q. (Continuing) —did you have any intention at that time, Doctor, of doing anything other than reporting to the German companies the facts with reference to your conference with Mr. Rupprecht in July of 1933?

3066 Mr. WEBSTER. I object to that. He is covering ground that was fully covered yesterday and two or three times today.

Mr. DIXON. There is a reason for it.

Mr. DIXON. What is the answer to the question?

(Question read.)

A. My intention with that letter was to tell whether Weber-Andreae and Kuhne that, as far as I am concerned, I am willing to take the chance in this matter.

Q. You did not say that in your letter, did you?—A. Well, as I said here, I think that is what it conveys.

Q. Just point out to the Court if you can—

The COURT. No, you will have to do that yourself. That is what he said was his intention. If it is not expressed in his letter you will call it to my attention on your argument.

We will suspend.

(Recess to 2:15 p. m.)

3067

AFTERNOON SESSION

GUSTAV ADOLF JEBSEN, resumed the stand.

The COURT. Are you going to have very much more, Mr. Dixon?

Mr. DIXON. I adhere to my statement, your Honor. I have no further questions.

The COURT. Very well. The witness is excused.

(Witness excused.)

GRAHAM W. CORDDRY, called as a witness on behalf of defendant National Lead Company, having been previously sworn, testified further as follows:

(Defendant N-L Exhibit 8 marked for identification.)

Direct examination by Mr. WEBSTER:

Q. Mr. Corddry, where do you reside?—A. 217 North Mountain Avenue, Montclair, New Jersey.

Q. What is your profession?—A. I am general sales manager of the Titanium Pigment Corporation.

Q. Had you had a technical education?—A. Yes.

Q. Of what character?—A. I was educated in St. Johns College, Annapolis, Maryland, majoring in chemistry.

Q. Since what date have you been general sales manager?—A. Since June 1, 1940.

Q. Prior to that what was your occupation?—A. I was eastern sales manager from 1935 until 1940.

Q. And prior to that?—A. From 1932 to 1935 I was a salesman with the Titanium Pigment Corporation.

Q. Now, before that were you employed by another company?—A. Before that I was employed by Devoe & Reynolds Company, a national paint and varnish manufacturer. At the time I left that company I was director of laboratories.

Q. Briefly, what sort of work did you do in the laboratories for the Devoe & Reynolds Company?—A. I originally formulated paint and varnishes, and later directed the formulation of all the paint and varnishes manufac

tured by that company, in charge of their laboratories in Brooklyn, Newark, Malden, Chicago and Louisville.

Q. How many persons are now employed under your direction in the sales department of the Titanium Pigment Corporation?—A. Well, we have 21 salesmen and approximately 12 employees in the office.

Q. Have those salesmen been selected with reference to any particular professional or technical qualifications?

—A. Yes. They have all been selected because of their technical knowledge of the paint and varnish industry or their technical knowledge in the rubber or paper industries.

Q. Are they men educated in chemistry or related subjects, to a large extent?—A. Yes.

Q. Is that entirely true or just partly true? I mean, as to the number of men.—A. That is entirely true.
3069 We might have one exception within the 21 men.

Q. To what extent has the number of salesmen employed by the Titanium Pigment Corporation increased since your connection with the company?—A. Roughly, I would say they have doubled.

Q. I show you National Lead Exhibit 8 for identification and ask you to state, if you know, what that is.—A. This is a handbook prepared by the Titanium Pigment Corporation and has been distributed to all of our customers for use by technicians for the furtherance of our—in order that they may have available data to increase the use of our products.

Q. Are there any secrets in this book?—A. No.

Q. Now you have a number of Titanox products, have you not?—A. Yes.

Q. And, roughly, those are classified as Titanox-A, Titanox-B and Titanox-C; is that correct?—A. Yes.

Q. Are there certain variations of those products that are known to you?—A. Yes.

Q. Is there any difference between Titanox-A and Titanox regular, or are they the same?—A. Titanox-A is our designation for all pure titanium pigments. We have been prefixing the designation "Titanox-A" to designate the different titanium oxides or titanium oxides designed for different purposes.

3070 Q. The description of Titanox-A contained in this book and the statements concerning the use of Titanox-A, are those accurate statements of the composition and use to which that product may be put?—A. Yes.

Q. You have a product called Titanox-AA. What is the nature of that, as distinguished from Titanox-A itself?—

A. Titanox-AA is a semi-non-chalking pigment which was designed primarily for use in exterior house paints, to reduce the chalking or fading of those finishes when formulated with regular Titanox-A or Titanox-AMO.

Q. Titanox-ANC, what is the difference of that from Titanox-A?—A. That is a pigment with still greater chalking resistance, the letters NC designating "non-chalking," and was designed for automotive finishes or for house paints, tinting base house paints where the optimum in chalking resistance was desired.

Q. What is the purpose of Titanox-AWDL?—A. They are water dispersing pigments produced for the paper industry, so designed that they will disperse readily and easily in aqueous solution, or water.

Q. Titanox-B, what is the chief characteristic of that?—A. Titanox-B is a so-called composite pigment composed of 30 per cent titanium oxide and 70 per cent of barium sulfate, and is used in the paint industry, the rubber industry and paper industry.

3071 Q. Does Titanox-B also have certain variations in manufacture?—A. Yes.

Q. Are those variations intended to meet particular conditions?—A. Yes.

By the COURT:

Q. These titles, Titanox-A and B, are they trademarks under which they are sold to the general public or—

A. Yes.

Q. —or only to the manufacturing trade?—A. We sell only to manufacturers.

Q. You do not sell to the retail trade?—A. No, sir.

Q. Under those labels?—A. No, sir.

Q. The manufacturer packs it in his own container and if he wants to sell retail he sells it under his own brand name; is that the idea?—A. Our pigments aren't ever sold retail as pigments; they are used in the formulation or manufacture of other items.

The COURT. I see.

By Mr. WEBSTER:

Q. For that reason your business is chiefly with what kind of customers?—A. It is entirely with manufacturing concerns. It is principally in the paint industry. —We also sell to paper, rubber, manufacturers of white shade cloth, floor covering, and many other industries.

3071a Q. With whom in these companies that buy Titanox products do your men maintain contact?—

A. We maintain contact with the chemists, plant superintendents, purchasing agents, and as far as possible with the management within these companies.

3072 Q. Do you have any contact of an appreciable sort with the ultimate users of paints?—A. No.

Q. Now, what is the outstanding chief characteristic of the Titanox-C pigments?—A. Titanox-C is a calcium base pigment used primarily in interior finishes, flat wall paint, enamels; and a newer grade of Titanox-C is now used in exterior paints.

Q. What grade is that?—A. That is Titanox-RC.

Q. What is the chief characteristic of Titanox-RC?—A. It is a—I will put it this way: it is the first calcium base pigment that was capable of had the properties which would allow its use in exterior house paint, and was the first calcium base pigment used in such finishes.

Q. Does this handbook contain data concerning United States Government specifications of various sorts?—A. Yes.

Q. What is the reason for putting that in the book?—A. So that paint formulators would have available these Government specifications and the products of our manufacture which meet those specifications.

Q. Does the book also contain formulae for house paint and other forms of paint?—A. Yes.

Q. What is the purpose of that?—A. Well, we have written into the handbook data developed by our company at our testing station at Sayville, Long Island, on 3073 the formulation and study of exterior house paints and exterior house paint primers, and this data has been disseminated to all of our customers so that they can benefit from the knowledge which we have developed. It is basically sales promotional data.

Q. Did all of the technical data in here come from your own research organization or is it based upon the experience of your own research in testing laboratories?—A. Yes.

Q. Now with reference to the research and laboratory work, what sorts of laboratories or testing laboratories does the company maintain?—A. We maintain a research laboratory which is purely for the study of pigments themselves in research into pigment manufacture and properties. We maintain a paint and varnish department laboratory that studies the formulation of paint and varnish products; a laboratory which studies the use of titanium pigments in the rubber industry and one which studies the

properties of our pigments in paper.

Q. Are these all maintained under the same roof?—A. No.

Q. Or at various locations?—A. The research laboratory is at the plant at Sayreville, New Jersey. The paint, rubber and paper laboratories are at 99 Hudson Street, New York. Besides that, we maintain the 3074 Sayville, Long Island, testing station.

Q. What is the nature of the work done at the testing station?—A. That is testing the exterior paints and enamels of our own formulation or formulation of other companies.

Q. Do the technicians employed in these laboratories go outside the laboratory in connection with their problems?—A. Yes.

Q. Where do they go?—A. At times, and before the war periodically, we would travel, one or more of our technicians, with or without our salesmen, in various territories, so that these technicians can bring firsthand data which they have developed to our customers.

Q. And I gather from what you previously said that when they do that they work with the customers and technicians in the customers' employ; is that correct?—A. Yes.

Q. Have you in mind any particular problems that have been worked on in that way?—A. Well, we have worked on many particular problems all over the country. The customer has a problem of formulating his paint or is now formulating it with a company's product, and they wish to have that formulated over to the use of our product. And we send a technician in to work directly with that manufacturer until the problem has been solved.

Q. In your opinion, and based on your experience, 3075 has that sort of cooperation been effective from a standpoint of sales?—A. Yes, quite.

Q. Has it also been effective from a standpoint of improving the customer's own product?—A. Yes.

Q. Have you from time to time published booklets containing information concerning investigations and studies relating to the manufacture and use of pigments?—A. Yes.

The COURT. You are referring to "you" as the company, or "you" as referring to the witness?

Mr. WEBSTER. I mean the company.

(Defendant National Lead Company's Exhibits NL-9 to NL-22 inclusive, marked for identification.)

Q. I show you National Lead Exhibits 9 to 22 inclusive for identification and ask you to go through those and simply indicate what each of those publications contains, the date of publication, and the purpose of publication, just stating your remarks in rather brief summary.

The COURT. Mr. Webster, I don't want to divert you from your line of examination, but I am having trouble in following the precise target at which you are aiming. I mean, I have not interrupted you because I have been finding it rather interesting from an educational point of view. But just how would it help me decide any of the issues which the complaint and the answers in this 3076 case present? Give me an idea; you don't have to elaborate.

Mr. WEBSTER. The claim as I understand it in this case is that there was an agreement between the du Pont Company and the National Lead Company in restraint of domestic and foreign commerce, and the purpose of this is simply to lay a foundation for additional information which will be offered through this witness to show that there was the most active—

The COURT. Competition?

Mr. WEBSTER. Competition.

The COURT. Between du Pont—

Mr. WEBSTER. Between du Pont and the National Lead Company.

The COURT. Let me ask you this. I don't know whether this will work out, but I am going to make the suggestion. Suppose you put the question bluntly, and I suppose you will get an affirmative answer, then let Mr. Dixon try to tear that down on cross-examination—even if he does, maybe he is not contesting it, but if he doesn't, he will come back and then I will give you full opportunity on redirect. It would be a rather extraordinary procedure but I think we may save some time.

It may be that Mr. Dixon is only concerned with a few departments of competition, in which case we will 3077 really need to know only so much. If you feel it is important, you know your case, I won't interfere with you.

Mr. WEBSTER. I do not believe that that would be satisfactory because Mr. Dixon has already introduced material and indicated that, in his stipulation, he will introduce additional material on the basis of which argument may be made now or later that there isn't active competition between these companies—I think it is quite essential.

The COURT. All right, go ahead.

Mr. WEBSTER. And I will abbreviate this—

The COURT. No. Take all the time that you need within reason. I have not seen this final stipulation which was supposed to have been presented as part of the Government's case.

3078 Mr. WEBSTER. I think it is still in process of gestation, and is not yet ready to be presented.

Q. If you will, please just state briefly what the purpose of each of these documents is, referring to the exhibit number and then to the title, with a very brief statement as to the purpose of each of these studies.

The COURT. Now the question has been put, Mr. Dixon: I did not want you to object in the midst of the question.

Mr. DIXON. That was not the purpose for which I arose, your Honor. I was about to answer the question you put with regard to the stipulation, and that is that the stipulation the Government submitted was under discussion between counsel which, I cannot say, we have agreed to, subject to submitting it to Mr. Webster, and the only reason that has not been done is because Mr. Rea is ill—that is one of the reasons; and the second reason is that it has not as yet been typed in final form.

The COURT. Very well.

A. National Lead Exhibit 9. The purpose of this booklet was to show the extent of our laboratories and study of the use of our pigments in the various consuming industries, showing our research in it.

The COURT. What you would call prestige advertising?

The WITNESS. Yes.

3079 The COURT. All right.

A. (Continuing) Exhibit 10 is the technical announcement of Titanox-RC and Titanox-RCHT, which were two new products we put on the market on January 10, 1941.

Exhibit 11 was a paper delivered by our rubber chemist, Mr. Breckley, on his study of the flexing characteristics of Buna-S compound, synthetic rubber compound formulated or pigmented with titanium pigments.

Q. Please give the dates as you go along. A. That was dated June 11, 1943.

Q. Exhibit No. 12 is a paper by two of our chemists on the method of testing the hiding power of paints, published in June, 1944; a very complicated technical study.

Exhibit No. 13 is a booklet on the physical study of two-coat paint systems, which data was developed by our

Sayville station in conjunction with the research laboratory.

Exhibit No. 14 is another booklet on exterior house paints and primers which covers some three or four years' work at Sayville.

Exhibit 15 is a booklet entitled "Hiding Effects in Flat Wall Finishes," written principally around Titanox-C in comparison to other white opaque pigments, particularly lithopone.

3080 Exhibit 16 is a booklet on exterior house paint formulations with chalk-resisting types of titanium oxides, which were then comparatively new on the market. It is dated March, 1940.

Exhibit 17. This is a booklet on titanium pigments and their use in the paper industry. It comprises several papers, developed by our paper laboratory. (February, 1937.)

Exhibit 18 is a paper written by Mr. Breckley of our rubber laboratory on research conducted on the use of titanium pigments in white sidewall tires.

Exhibit 19 is a study by the paint and varnish laboratory on the conservation of oil which was written in Houston, Texas, on June 9, 1943, following the oil restrictions required by the War Production Board.

National Lead Exhibit 20 is a study on prospective post-war paints, dated May 15, 1944, and outlines our study principally into water or emulsion type of finishes.

Exhibit 21 is a booklet which was printed in Portuguese and was distributed throughout South America except Brazil.

The COURT. Except Brazil?

The WITNESS. This is just the wrong way around.

The COURT. I should be surprised that they published a paper in Portuguese, and distributed everywhere
3081 except Brazil.

The WITNESS. Yes. I have forgotten which language they speak in each of those countries.

The COURT. It is Portuguese there.

The WITNESS. This is distributed throughout South America, except in Brazil, and printed in Portuguese, introducing—

The COURT. Printed in Spanish. The one that was distributed throughout South America, except in Brazil, was printed in Spanish, was it not?

The WITNESS. That is right.

(Continuing)—introducing our company and our pigments and their uses to the South American market.

The COURT. The date?

The WITNESS. 1943.

A. (Continuing) And Exhibit 21 was a booklet—that is one we have covered.

Exhibit 22 is a booklet which was printed in Portuguese and distributed throughout Brazil for the same purpose as Exhibit No. 21.

Q. Now referring to the papers of a technical character, to whom were those distributed, that is the pamphlets and papers of a technical character?—A. To technicians in the industries covered by the paper.

Q. Have you ever made any effort to issue a publication to stimulate an interest in Titanox products to consumers of paint and rubber and other articles of that sort?—A. Not maybe as far back as the actual consumers themselves. We have issued one booklet which was distributed to architects and also to manufacturers of white footwear or paint, which was then distributed by those manufacturers to their customers, which would be a paint store or a footwear store.

Q. Now, is that exhibit National Lead's 9 for identification with reference to the "Service Behind the Emblem"?—A. Yes.

(National Lead Exhibit 23 marked for identification.)

Q. Mr. Corddry, have you prepared or had prepared under your direction a chart showing the tons of Titanox products in terms of TiO_2 compared with prevailing prices for your products for the period 1920 to 1944?—A. Yes.

Q. I show you National-Lead Exhibit 23 for identification and ask you if that is the chart you refer to as having been prepared by you?—A. Yes.

The COURT. Does that show sales by TPC or by everybody?

Mr. WEBSTER. Well, I will ask the witness in just a minute.

Q. What was the course of the information that was used to compile this chart?—A. Our own sales records in the case of sales and our records within the sales department or the accounting department as regards prices.

Q. So far as this shows sales of Titanox products in terms of TiO_2 , those of course are sales by the Titanium Pigment Corporation, are they not?—A. Yes.

Q. And do not purport to include any sales by any other company or companies?—A. No.

Q. And likewise the prices are your own prevailing prices for the period shown on the chart?—A. Yes.

Mr. WEBSTER. Now I think the chart speaks quite adequately for itself, but just so that there can be no question about the identification later, I want to ask two or three questions about the chart.

Q. What does the chart show with reference to your sales for, say, 1921?—A. Approximately 500 tons.

Q. Now I note that there was an increase in sales from 1921 to 1937. Will you direct your attention to that point in the chart, please?—A. Yes.

Q. And that there appears to have been a recession of sales in terms of volume during the year 1937; is that correct?—A. Yes.

Q. Can you explain the reason for that?—A. I can explain it as being a general condition at the time and merely due to the depression.

Q. How about inventories? Did they have any
3084 thing to do with that or was it purely a depression factor?—A. As far as I know, the inventories did not have anything to do with it.

Q. Now, directing your attention to the point to which the sales volume rose in 1941, what does that show with reference to sales of Titanox products in terms of TiO_2 at that time?—A. A little better than 68,000 tons.

Q. Now there appears to have been a recession from that point to a point in 1942. Can you explain that?—

A. Well, that was due principally to overbuying in 1941, and a consumption of inventories in 1942, and the fact that the paint industry itself declined in the same year.

Q. Since that date the curve shows a continuous rise running outside the chart; is that correct?—A. That is correct.

Q. Now, Mr. Corddry, the chart indicates that the price at which sales began in 1928 was 40 cents. What is the reason for not having any price shown with reference to the period prior to 1928?—A. The price from our records could not be definitely shown. Since this chart was prepared, nevertheless, I think that the accounting department now has sufficient evidence to prove that the price, the year prior to this chart, the price in 1926, the first sale was made at 50 cents rather than at 40 cents.

Q. To what point had the price dropped by the
3085 middle of 1939?—A. 13 cents.

Q. To 13 cents?—A. Yes.

Q. Now, this is a composite chart, is it not, in the sense that the prices represent the prices in terms of TiO_2 content of all Titanox products?—A. No, it does not. It represents the prices of pure titanium oxide, the curve that I am referring to.

Q. Whereas the other curve represents the increase in volume in terms of TiO_2 content?—A. That is correct.

Q. Volume sale.

The COURT. Are you offering it in evidence?

Mr. WEBSTER. I thought I would wait and offer them all.

If the Court please, I think I will at this time offer in evidence National Lead Exhibit 23 for identification which is the chart just described by the witness.

The COURT. Without objection it will be received. (NL Exhibit 23 for identification received in evidence.)

3086 Q. Mr. Corddry, have you prepared or had prepared under your direction a chart showing the annual sales in tons of Titanox pigments, compared with other white opaque pigments?—A. Yes.

(Chart marked Defendant's Exhibit NL-24 for identification.)

Q. I show you National Lead Exhibit-24 for identification and ask you if that is the chart that we have just referred to and as to which you gave your answer?—A. Yes, sir. :

Q. From what source or sources was the information on that chart obtained?—A. The information regarding the Titanox pigment was obtained from our own sales records. Information regarding white lead, zinc oxide and lithopone was obtained from the Bureau of Mines.

The COURT. That is the Department of the Interior?

The WITNESS. The Department of the Interior.

Mr. WEBSTER. I offer that in evidence, if your Honor please.

(Defendant's Exhibit NL-24 for identification received in evidence.)

Q. May I ask if there are any sales shown on this chart other than sales of the products of the National Lead Company, or the Titanium Pigment Corporation?—A. Yes.

Q. I mean— A. It shows lithopone and zinc
3087 oxide, which we do not manufacture.

The COURT. He means the Titanox pigments. Any Titanox pigments manufactured by other concerns than your own.

The WITNESS. No.

Q. Now with reference to the lithopone sales and the zinc oxide sales and the white lead sales, are those the total of the United States sales?—A. I think yes; I think so.

Q. So that the comparison here is only a comparison between sales by the Titanium Pigment Corporation and all sales of those other products, is that correct?—A. Yes.

By the COURT:

Q. Do I understand, Mr. Corddry, that the solid lines represent pure TiO_2 and that the dotted lines represent composite pigments?—A. No. The dotted line represents all pigments, the composite and the pure pigments, whereas the solid line is the TiO_2 content of all pigments.

(Chart marked Defendant's Exhibit NL-25 for identification.)

Q. Mr. Corddry, have you at my request prepared a chart showing the increase in use of titanium pigments in various industries, that is, the paper, welding rods, rubber and leather industries, for the United States, in terms of TiO_2 content of your pigments from 1933 to 3088/1943?—A. Yes.

Q. I show you National Lead Exhibit 25 for identification and ask you if that is the chart that you refer to?—A. Yes.

Mr. WEBSTER. I offer that in evidence, if the Court please. (Defendant's Exhibit NL-25 for identification received in evidence.)

Q. Now just to make sure about the lines, what is the use made of titanium pigments in paper? You said it was used in paper.—A. It is used in two ways. It is either added to the paper or in some way incorporated in the paper itself, or for coating purposes for greater opacity or brightness or both.

Q. And has the use of titanium paper been an increasing use?—A. Yes, very decidedly.

Q. Now what is the use indicated by the words, welding rod coatings, what is that use?—A. Welding rods, for a higher grade of welding, are coated with titanium oxide for very highly technical reasons. It makes a better weld, if that is a sufficient answer.

Mr. WEBSTER. Yes.

Mr. WHITNEY. Mr. Webster, just for clarity, is this just your company or the whole industry?

Q. Will you answer that question, Mr. Corddry?—3089 A. It is our sales only.

Mr. WHITNEY. It does not say so, and that is why I asked.

Q. You have not attempted on any of these charts to include any estimates of sales by any other company or companies, is that correct?—A. No.

(Chart marked Defendant's Exhibit NL-26 for identification.)

Q. Mr. Corddry, have you at my request prepared a chart showing sales of Titanox-A, Titanox-B and Titanox-C, in or to Canada, for the period from 1929 to 1944?—A. Yes.

Q. I show you National Lead Exhibit 26 for identification and ask you if that is the chart you refer to?—A. Yes, it is.

Mr. WEBSTER. I offer it in evidence, if the Court please. (Defendant's Exhibit NL-26 for identification received in evidence.)

Q. Mr. Corddry, from 1933 until say 1937, did Titanox pigments tend to replace or supersede lithopone in the manufacture of paint?—A. Yes.

Q. Can you explain the reason for that?—A. It replaced lithopone because it was of greater dollar value to the paint manufacturer than lithopone.

Q. Now can you just translate into terms of cost per square foot of hiding power, or the pigment cost per square foot of hiding power?—A. Well, for 1000 square feet of hiding power an enamel, for instance, pigmented with Titanox-RC-HT, would cost 40 cents per 1000 square feet, whereas lithopone would cost 60 cents and cover that same area.

Q. Can you give that same example in terms of square feet of hiding power per dollar?—A. I do not know that I can.

The Court. That is an arithmetical calculation and with a piece of paper we can all do it. I don't think you need trouble the witness about that. 2500 feet for a dollar, isn't that right?

The Witness. As I remember, you get 2550 square feet for Titanox-RC-HT per dollar, and 1600 for lithopone.

Q. Do your products duplicate, or tend to duplicate to some extent, products of your competitors?—A. Yes.

Q. Is there any reason for that?—A. Well, the basic reason is that we must have pigments of equal value to those of our competitors in order to enjoy business, in order to sell our pigments.

Q. Apart from pigments which are accepted by consumers for similar uses, do you have varieties of pig-

3091 ments that are different, that is, entirely different, from varieties offered by your principal competitors?—A. Yes.

Q. Can you indicate examples of that?—A. Well, there have been times when we have manufactured and placed on the market a pigment different from that manufactured by competitors and also they have from time to time produced and marketed pigments different from those which we had on the market. I could mention Rutile non-chalking pigment now produced by one of our competitors that we still do not manufacture. And we also manufacture lead titanate which was never manufactured by any competitor and they have manufactured colored titanium oxides which we have never manufactured.

Q. Do you and the du Pont Company sell your products to, or endeavor to sell your products to, substantially the same list of customers?—A. Yes.

Q. Do you make any effort to allocate customers with the du Pont Company?—A. No.

Q. What is your effort in that respect?—A. Well, we use our best effort to sell any and all customers.

Q. Do you and the du Pont Company have any arrangement with reference to the division of customers in respect of territories of sale?—A. No.

Q. And are the salesmen in your department engaged in pushing Titanox products all over the United States?—A. Yes, sir.

Q. Now do you from time to time lose customers to the du Pont Company?—A. Yes.

Q. And do you from time to time get customers away from the du Pont Company?—A. Yes.

The Court. Undoubtedly more frequently in the reverse?

The Witness. Oh, entirely so.

Q. Have you an account called Timeproof Paint Products Company?—A. Yes.

Q. Is that an account of yours?—A. It is now, yes.

Q. Is that a customer that formerly purchased from the du Pont Company?—A. Well, that company originally purchased from us. Then due to some inconsistencies in our products we lost the account to a competitor, and then in 1941 or 1942 we regained the account.

Q. Is that a substantial account?—A. Yes.

Q. Now have you an account called the Margate Manufacturing Company?—A. Yes.

Q. Has that always been your customer?—A. Margate

was our customer, one hundred per cent, for many years, and in approximately 1940 a competitor offered them a grade of pigment which we did not then manufacture and they took the account away from us and unfortunately still have it.

3093 Now what is the situation with reference to the Cook Paint and Varnish Company?—A. The Cook Paint and Varnish Company up to 1935 purchased their pure titanium oxide from a competitor and their composite pigments from us. In about 1935 a competitor for the first time offered composite pigments in the market and the account changed to the competitor and then purchased their entire requirements from the competitor up to about 1941, at which time we manufactured and placed in their hands a grade of pigment which they preferred to that which they were buying from the competitor, with the result that we now have their entire business on composite pigments and a portion of their business on pure pigments.

Q. Now tell us how about the case of the Kuhn Paint and Varnish Works of Houston, Texas, what is the situation there?—A. Kuhn had always bought from a competitor, and in 1938 or 1939, or it may have been later than that, it may have been 1940, we appointed a sales agent in the State of Texas and through that agent and through having a local representative who knows and is intimate with the customers in that area, we have been able to gain most of the Kuhn Paint Company's business, probably 95 per cent.

The COURT. I think these are intended to be illustrative, isn't that so?

3094 Mr. WEBSTER. Yes, that is true.

The COURT. You are not trying to prove each one of these individual transactions?

Mr. WEBSTER. No, your Honor.

The COURT. Do you think we have had enough illustrations?

Mr. WEBSTER. Yes, I think we have.

Q. There are other cases of that sort where business has been taken away from your competitors and where they have taken business away from you?—A. Yes.

(Short recess.)

Q. Mr. Corddry, in your description of those cases of customers gained from and lost to the competitors, the competitor that you referred to was the du Pont Company, was it not?—A. It was either the du Pont Company or their agent, the R. T. Vanderbilt Company.

Q. And ~~that~~ was true in all the cases you described?
A. Yes.

Q. Now you spoke of having employed an agent in Texas. Was that a customary arrangement or an unusual arrangement?—A. It is unusual. Our general policy is to sell through our own representatives. We have only three agents throughout the country. This agent in Texas was one of those.

Q. Where are the other agents located?—A. On
3095 the Pacific Coast.

Q. Is there any particular reason for maintaining agencies instead of engaging in direct selling on the coast?—A. One of our agents on the Pacific Coast is the National Lead Company, Pacific Coast Branch, who represent us in the States of Oregon and Washington. In California we have an agent who was particularly qualified to represent us and to get business for us which we considered would take a long time by direct selling because of their intimate contact with some of the major accounts in California.

Q. Now in terms of percentage of sales, could you estimate the percentage of sales that are made through agents, as distinguished from direct sales by the company itself, just roughly?—A. Roughly I would say it would be less than five per cent.

Q. Now what is your method of making sales to South America in countries other than the Argentine?—A. Did you say what was the method?

Q. The method.—A. We have appointed Binney & Smith Company as our sales representative in South America, except in Argentina, and Uruguay.

Q. What is the nature of the business of the Binney & Smith Company?—A. They are principally lamp and carbon black manufacturers and they also maintain an export department, exporting many commodities to South America.

3096 Q. Do they have a sales organization in South America?—A. Yes.

Q. And was that the reason for appointing them as exclusive agents, or one of the reasons?—A. That was one of the principal reasons, yes.

Q. What other reasons are there?—A. Another reason was that we wished to select a reputable and honest company and one with that reputation in South America to represent us.

Q. Now there is a difference, is there not, in your representation in the Argentine?—A. Yes.

Q. Through what agency do you distribute in the Argentine?—A. National Lead Company, S.A.

Q. Is that a subsidiary of the National Lead Company?—A. Yes.

Mr. WEBSTER. May I interrupt a second to offer in evidence National Lead Company Exhibits 8 through 22 inclusive.

The COURT. Only on the stipulation that if this record has to be printed, you are not going to ask to have them incorporated in the printed record?

Mr. WHITNEY. What are these?

Mr. WEBSTER. These are all pamphlet publications. That is a stipulation I shall be glad to make, your Honor.

3097 The COURT. All right. Otherwise I won't receive them.

Mr. WHITNEY. I assume that we will have reasonable access?

The COURT. Oh, yes. Of course they are exhibits in the case if they are received in evidence. I would not burden any appellant, whoever it may be, with the necessity of printing any of that material.

Mr. WEBSTER. No. I think that is a very proper limitation, your Honor.

(Defendant's Exhibits NL-8 through NL-22 for identification received in evidence.)

Mr. WEBSTER. That is all, your Honor.

Cross examination by Mr. Dixon:

Q. Mr. Corddry, in 1928, by referring to Chart No. 23, I notice that the price of Titanox-A was listed on the chart as 40 cents a pound, is that correct?—A. Yes.

Q. Now at that time National Lead Company made some composite pigments, Titanox-B and Titanox-C, that is correct, is it?—A. I don't know whether Titanox-C was on the market in 1928.

Q. Well, it would appear to be from the chart, if I read your chart correctly?—A. Yes.

Q. Now the Titanox-A was the pure TiO_2 , so-called?—A. Yes.

Q. And the B and C were the composite pigments, is that correct?—A. That is correct.

3098 Q. And those were the three grades made by National Lead Company at that time in 1928?—A. Yes.

Q. Now coming to 1933, say from the period of 1928 to 1933, January 1st of 1933, those same general grades were made, namely, a TiO_2 or pure pigment and the two grades of composite pigments?—A. Yes.

Q. And what percentage of the total sales of the National Lead Company were represented by those three pigments at that time; in the pigment field, of course, of National Lead—all of it?—A. I do not understand the question.

Q. Well, did you manufacture any other type of pigments other than the Titanox-A, B and C on January 1, 1933?

The COURT. Referring to Titanium Pigment Corporation or the National Lead Company?

Q. Titanium Pigment Corporation was your manufacturing concern at that time, was it?—A. Yes.

Q. And the only one?—A. Titanium Pigment Company at that time.

Q. Yes. That is right. As a matter of fact did the Titanium Pigment Company manufacture any other grades than the A, B and C?—A. No.

Q. And did they manufacture any other grades than the A, B and C up to and through the year 1936, if you recall?—

A. I do not know when they manufactured for the 3099 first time lead titanate. It was probably, if my recollection is correct, it would be 1935 or 1936.

Q. Well, would you say it was a fairly reasonable statement, I mean a fairly correct statement, to say that substantially all of the production of the Titanium Pigment Company and National Lead Company through 1936 was in those three grades of pigments?—A. That is correct.

Q. Now, was there any other company in the business at that time selling either a pure pigment or a composite pigment?—A. Yes.

Q. What other companies were there?—A. There was Krebs Pigment & Color Company.

Q. Was that the only company?—A. As I remember it that is correct.

Q. And up to January 1, 1933 what product was Krebs Company manufacturing?—A. The pure pigment.

Q. That is just the TiO_2 ?—A. Yes.

Q. Now do you know what grades Krebs manufactured through the year 1936—from 1933 to 1936?—A. I believe it was in the middle of 1935 that Krebs first manufactured Titanox-B and Titanox-C or the equivalent to B and C pigments.

Q. That is the commercial equivalent of your Titanox-A and Titanox-B?—A. No, B and C.

Q. And the commercial equivalent of your Titanox-A was the Ti-Pure Krebs product?—A. Yes. That is correct.

3100 Q. That was the trade-mark for their TiO_2 , is that correct?—A. That is right.

Q. So that through the year 1936 the Krebs Company was manufacturing, the latter part of 1935 to the end of that year if I understand your testimony correctly, substantially only a TiO_2 or what they sold under the trade name of Ti-Pur?—A. That is right.

Q. And your commercial equivalent for that product was Titanox-A?—A. That is correct.

Q. Now by referring to this chart I notice that during the years 1933 through a portion of 1936 that the price of your Titanox-A was very steady at 17 cents a pound. Do you know what the price of the commercial equivalent product of Titanox-A sold by Krebs was during that period?—A. No.

Q. Do you have the records to indicate what it was, as sales manager of the National Lead Company?—A. I don't know whether we have specific records as to what other prices were at the time.

Q. Well, do you have any way of stating to the Court, from your experience as sales manager of National Lead Company and Titanium Pigment Division, from your records what the prices were of Ti-Pur during the period of time that I have mentioned, namely, from 1933 through the latter part of 1936 when your chart shows the
3101 price of Titanox-A at 17 cents a pound?—A. I have difficulty in whether I should answer that by memory or whether I must refer to some specific records. If you wish me to answer by memory—

By the COURT:

Q. You knew your price was 17 cents a pound down to 1936?—A. Yes.

Q. I assume that any sales manager keeps himself abreast of his competitive prices?—A. That is correct.

Q. You try to find out by one way or another— A. That is correct.

Q. You may not always get precisely correct information but you try to get as close to that as you can, is that so?—A. That is so.

Q. So you must have some recollection whether you

were at that time selling at a premium above it or whether you were selling at a disadvantage of Ti-Pur or whether the prices were exactly the same?—A. Oh, I have that very definitely, but I thought I might have some factual proof—

Q. Oh no.—A. My recollection is that they were sold at exactly the same price.

By Mr. Dixon:

Q. Now say from January 1, 1937 on—I am just taking an arbitrary date now, Mr. Corddry—were there any other grades other than those that you mentioned, 3402 Titanox-A, B and C, put onto the market by National Lead Company?—A. We put on the market a product called Titanox-L, or lead titanate.

Q. Is there a corresponding product manufactured by the du Pont Company, or was there at that time?—A. No.

Q. Is there today to your knowledge?—A. No.

Q. Is there any product in the nature of Titanox-M manufactured by the du Pont Company?—A. Yes.

Q. What is the name of that product?—A. Ti-Sil.

Q. Is that product commercially comparable or equivalent to your Titanox-M?—A. Yes.

Q. And what is the price at which your Titanox-M is sold?—A. We have discontinued Titanox-M for the last three years.

Q. What was the price before you discontinued the sale of it, do you recall?—A. I think it was 5½ cents per pound.

Q. And what was the price of the corresponding commercial equivalent product of du Pont?—A. The same price.

Q. What percentage of the total sales of the National Lead products represented pigments, I am speaking of now titanium pigments, is represented by your grades, Titanox-A, B, C and M?

The COURT. And L? Or don't you want L?

Mr. Dixon. I believe the lead titanate, I understand, is a little bit different, your Honor.

The COURT. All right. You want to know the percentage of their total sales represented by A, B, C, and M?

Mr. Dixon. Approximately.

A. 99 plus.

Q. In other words, that represents pretty close to 100 per cent of your entire sales.

Now, Mr. Corddry, the price of Titanox-A, as I understand it, according to this chart was—

Mr. WEBSTER: Is that Exhibit 23?

Mr. DIXON: Yes.

Q. —was 17 cents a pound in 1937, is that correct?—

A. I cannot recall the price by year, but the chart is correct to the best of our ability.

Mr. WEBSTER: Shall I show him the chart?

The COURT: Yes. Go ahead and show him the chart.

Mr. DIXON: I thought he had the chart. Really I am sorry.

(Exhibit handed to witness.)

The WITNESS: The price was 17 cents.

Q. What was, if you know, the price of the corresponding commercial equivalent du Pont product, Ti-Pur?—A. That was the same price. That is from recollection.

Q. Yes. I understand.

3104 Mr. WEBSTER: I think, Mr. Dixon, in 1937 the price according to the chart was 16 cents. I don't know that it matters for your purpose.

The COURT: The witness says it was 17. I will take the witness's word for it.

The WITNESS: That is correct.

Q. Will you state to the Court what the price of Titanox-A was in 1938?—A. It was 16 cents.

Q. What was the price of Ti-Pur, the corresponding commercial equivalent product, at that time? The same?

The COURT: If we are going to get the same for all the years we can point them all in one question: Is the price of Ti-Pure and the Titanox-A of National Lead running the same right down the line?

The WITNESS: Yes.

Mr. WHITNEY: Not to interrupt any cross examination, but just to say that all these prices are in evidence already.

Mr. DIXON: I knew the National Lead, but not du Pont.

Mr. WHITNEY: Yes. Both of them, so this is really testing credibility.

The COURT: All right.

Q. What is the commercial equivalent of Titanox-B?—

A. Ti-Bar.

3105 Q. And Titanox-C?—A. Du Pont Ti-Cal.

Q. And has there been any differences in the prices of those commercial equivalents of National Lead as against du Pont's corresponding equivalent products?—

A. No.

Q: Now Titanox-L, is there any corresponding commercial equivalent product manufactured by the du Pont Company?

The COURT. The witness said no a long time ago.

Q. I believe you mentioned, Mr. Corddry, that you had lost some of your customers to du Pont. Did you ever lose any of them on account of price?—A. No.

The COURT. Manifestly no. He says the price was the same.

Mr. DIXON. That is all, your Honor.

Cross examination by Mr. WHITNEY:

Q. Mr. Corddry, when you say that a product is commercially equivalent you do not necessarily mean that is chemically identical, do you?—A. Not necessarily, no.

Q. Or physically identical?—A. No.

Q. And presumably it will accomplish most of the objectives that a consumer might have that the other product will accomplish?—A. That is right.

But not necessarily all the objectives? One
3106 might accomplish something that the other one would not accomplish?—A. Yes.

Q. Now you are aware, aren't you, that, taking Ti-Pur for example, du Pont has at least four different types of Ti-Pur, HH, HHK, HHW and YCR?—A. Yes.

Q. And those have different, maybe not greatly, but to some extent different qualities?—A. Those four du Pont—

Q. Yes.—A. Yes.

Q. So that when you are answering that Ti-Bar is commercially equivalent to Titanox-B you mean in a general sense rather than in any precise sense, isn't that so?—A. Ti-Bar and HH, for instance, are similar commercially to Titanox-B-30. The du Pont Company would manufacture a grade, or it manufactured a grade of Ti-Pur, YCR, which is equivalent to Titanox-AA, so that each grade of Ti-Pur is equivalent, commercially, to a grade of Titanox-B-30, but not in groups.

Q. Then there are several different grades of Ti-Bar produced by your company, are there?—A. Yes.

Q. So that to that extent it would be right to say that when you were responding to Mr. Dixon's inquiry about Ti-Bar and Titanox-B you only meant in a general sense they were equivalent, because there are different qualities within each?—A. Yes.

Mr. WEBSTER. You do not mean to say there
3107 were several grades of Ti-Bar produced by both companies?

Mr. WHITNEY. Ti-Bar or Titanox-B.

Q. Now the same is true to an even greater extent as among various grades of Titanox-C or Ti-Cal, is it not?—

A. Yes.

Q. I am told that du Pont has at least seven grades. I would just like to ask you whether, on the whole, you would agree there is grade R-20 that is a general purpose rutile calcium pigment for all kinds of architectural finishes—I am not asking you to agree that it is correctly stated, but it is a du Pont product— A. Yes.

Q. And R-21 is more readily disposable and designed for gloss paints and enamel, is it not?—A. Yes.

3108 Q. And R-25 retains the superior properties of R-21 but it is less affected by water and humidity?

The Court. The witness need not commit himself on that.

Q. (Continuing) Well, that is superior in the sense that the R-21 is superior to R-20?—A. Yes.

Q. That you would not disagree with. And R-30 has high flat hiding rutile type and has thick consistency and minimum flats, is that right?—A. Yes.

Q. I won't burden you or his Honor any longer, except would this be fair to say that there is a very great variety of products between various companies within this 99-plus per cent?—A. Yes, sir.

Q. Now, not merely do you make lead titanate, which du Pont does not, but you have other products, do you not, too? That is merely an example of the products that you make that du Pont does not make?—A. Yes.

Q. For example you have—I do not know how to pronounce it—phthalate-treated products, do you not?—A. No longer, no. We did have that at one time—phthalate-treated products at one time.

Q. And other products similarly?—A. Yes.

Q. And has du Pont had really a great number of products that you have not seen fit to go along with or you have not had the equivalent of?—A. Well, I
3109 will say several.

Q. Well, I have a list here of over 20.—A. Well, they have been holding out on me.

Q. Who has been holding out on you? I like that answer. Who has been holding out on you?—A. I could not recall 20.

Q. I want you to answer my question, Mr. Cordery: who has been holding out on you?—A. No one.

Q. You meant that in humor, didn't you?—A. Yes.

Q. Now whenever du Pont would reduce or increase a price in respect of a product for which you considered that you had a commercial equivalent product, in the sense in which you have used "commercial equivalent" here, you would immediately reduce or increase your price in order to meet the competition, would you not?—A. Yes.

The COURT. How do you meet competition by immediately increasing the price?

Mr. WHITNEY. For the present let us take only a reduction.

Q. You would immediately reduce?—A. Yes.

Q. And vice versa, if you reduced du Pont reduced. As a matter of fact, how many increases of the price, for example, of Titanox A, have there been prior to the war?—A. None. Well, there was one.

Q. I think there was an increase in 1941, was there 3110 not?—A. An increase January 1, 1941.

Q. Then there was a second increase in the same year, was there not?—A. Yes.

Q. But no increase further until 1941?—A. That is correct.

Q. Which party first instituted that increase; National Lead or du Pont? Do you remember?—A. No, I don't remember.

Q. Wasn't that a price that was approved or recommended by the War Production Board?—A. No, I do not think so.

Q. Now did there ever come a time when either company would produce an important product of different grade from that of the other company?—A. Will you repeat it?

Q. Did there ever come a time when either company produced a product that you would call improvement that had not theretofore been produced by the other company?

—A. Yes.

Q. And would it be true to say that in each instance the other company promptly sought to match the product for quality?—A. Yes.

Redirect examination by Mr. WEBSTER:

Q. Mr. Corddry, when you said that the Titanox-A was the commercial equivalent of a du Pont product, did you mean to say that you and your salesmen would concede that the du Pont product was as good as Titanox-A?—A. (No answer.)

3111 Q. To put it another way: There were always differences, were there not, on the basis of which, —technical or use conditions—on the basis of which you and your salesmen made an effort to sell the Titanox product at the expense of the du Pont product?—A. Yes, that is true.

Mr. WEBSTER. That is all.

Recross examination by Mr. WHITNEY:

Q. In January, 1940, in respect of Ti-Pur, first is it not true that you heard that du Pont reduced the price one cent and that you thereupon followed suit immediately as soon as you could get your cards ready to give notice to your salesmen? Do you remember that example of the first reduction of price?—A. On the one grade of pigment?

Q. Yes.—A. No, I do not recall.

Q. I do not think we have to press it. And then in respect of the 1941 increases, isn't it true that your company announced early in December, 1940, that there would be an increase and then du Pont followed and issued an announcement to the same effect and price a few days later?—A. I do not recall whether we announced the increase prior to du Pont having announced it, or whether they announced it prior to ours.

Mr. WHITNEY. I think, if the Court and Mr. Dixon will permit me to say it, I am not trying to put it onto you or saying du Pont originated it. I would be just as
3112 happy the other way.

Q. But it was the fact on these two increases in 1941 that it was announced by one of the companies and then the other one followed up?—A. Yes.

The COURT. Without prior arrangement?

The WITNESS. Yes.

Redirect examination by Mr. WEBSTER:

Q. Inasmuch as Mr. Whitney has brought up a price change in January, 1940, I would like to give you a copy of a letter dated January 16, 1940, taken from the files of the National Lead Company purporting to be a memorandum from Mr. Hagar to Mr. Edgerly, or Mr. Edgerly to Mr. Hagar, and ask you if that refreshes your recollection (handing to witness)?—A. It does not refresh my recollection, no. It is a statement of fact.

3113 The COURT. Mr. Dixon.

Mr. DIXON. I wanted to ask Mr. Corddry a question from this chart 23.

The COURT. Will you let the witness have 23, Mr. Webster?

(Handed to the witness.)

Recross examination by Mr. DIXON:

Q. By referring to the chart, 23, National Lead exhibit for identification, I notice a slight increase in the price of Titanox-C pigments in 1937. Do you recall that? Mr. Corddry?—A. Yes, I recall a slight increase in price.

Q. Do you recall whether a corresponding increase was made on the same day by the du Pont Company with their corresponding commercially equivalent product?—A. No, I can't recall that it was made the same day.

Q. Was that the time that the price was raised from $5\frac{3}{4}$ cents to $5\frac{7}{8}$ cents?—A. Yes.

Q. You say you don't recall whether the Krebs or du Pont prices increased on the same day?—A. On the same day, no, I can't recall.

The COURT. Did you operate in those days on a strictly uniform basis or did you operate on a different discount basis with different customers?

The WITNESS. No. We operated on a uniform basis, with price cards printed and distributed to all customers, the terms the same to all customers.

Recross examination by Mr. WHITNEY:

Q. It would be a fair summary of your evidence to say that the competition between you had been on the basis of trying to sell quality, that your quality was better than du Pont's?—A. That has not been the principal basis on which we have sold our pigments. Our pigments have been commercially equal in value and we have recognized that fact, and we have had to use other means, generally speaking other means, to sell in competition to du Pont. That is, by knowing our customers intimately, by technical service, and using our best efforts to sell. Incidentally we bring in differences in grades or properties that we felt our pigment had over those in competition.

Q. And the adaptability of the customers' use needs as studied by you?—A. Yes.

Q. And then servicing him in respect of the needs?—A. Yes.

Q. So that he got not merely the product but he also got the service within the price of the product?—A. Yes.

(Witness excused.)

3126 FLETCHER W. ROCKWELL, called as a witness on behalf of defendant National Lead Company, being first duly sworn, testified as follows:

Mr. WEBSTER. If the Court please, we have prepared in one volume printed copies of certain correspondence taken by the Government from the files of the Lead Company relating largely to the Zirconium Corporation, and I think that if the Court will accept it it would be more convenient from every standpoint simply to introduce that printed volume in lieu of introducing each of the individual photostatic copies of letters, subject of course to comparison and correction.

3127 The COURT. Is there any objection to that course? There is none. You may offer it in that form. As a single or multiple exhibit?

Mr. WEBSTER. As a single exhibit.

The COURT. Very well.

Mr. WEBSTER. I offer in evidence pages 1 through 107 of a page proof of certain correspondence dated at the top "January 20, 1945 Ad. Press".

(Marked Defendant National Lead Company Exhibit NL-28 in evidence.)

Mr. WEBSTER. There is a separate document at the end that I am going to offer separately.

Mr. WHITNEY. It may be helpful in the future, your Honor, if all agree, that the page numbering stay, otherwise there would be no way of referring to the respective documents.

The COURT. Very well, the pagination will remain.

Mr. WEBSTER. At the end of this volume there is a printed copy of an agreement between the Glidden Company, the American Zirconium Corporation and the National Lead Company, running from pages 108 through 112, which I simply ask to have marked for identification at the present time.

(Marked Defendant National Lead Company Exhibit NL-29 for identification.)

3128 Mr. WEBSTER. If the Court please, my plan, if I may, is to make certain comments concerning these documents and also, I believe, go through the documents, where it seems appropriate, and ask Mr. Rockwell certain questions about transactions referred to in the documents.

The COURT. Very well, you may proceed.

Direct examination by Mr. WEBSTER:

Q. Mr. Rockwell, where do you reside?—A. 277 Park Avenue.

Q. Are you the president of the National Lead Company?—A. Yes.

Q. How long have you held that position?—A. Since January 1938.

Q. How long have you been connected with the National Lead Company?—A. 48 years.

Q. In what capacity were you first employed by the National Lead Company?—A. As superintendent of a Western plant.

Q. How long did that employment continue?—A. 25 years.

Q. What was your next position with the company?—A. I came East to become production manager of the company.

Q. In what year?—A. In 1920.

Q. How long did you serve as production manager?—A. Until 1938.

Q. How is the National Lead Company organized with reference to its branches or divisions?—A. We have companies and divisions and subsidiaries over the country all under local management.

Q. What are the principal divisions of the National Lead Company?—A. Well, there is the Magnus Metal Company.

Q. What is its business?—A. They make railway journals, journal bearings. There is the Titanium Division. They make titanium products. There is the Baroid Sales. They make weighting mud for well drilling.

Q. How about the American Bearing?—A. The American Bearing, well, they make journal bearings for Diesel engines. And there are a number of subsidiary companies, like American Lead. They are refiners of secondary metals. There is quite a number of smaller divisions.

Q. How about magnesium manufacture? Does the company engage in that?—A. Well, the magnesium, we don't do much with that.

Q. You have a plant, do you not, for the manufacture of magnesium?—A. Oh, that is down in Luckey, Ohio. That is a Government plant but we operate it.

Q. Is your organization set up so that the president has overall responsibility for the management of the company?—A. He has overall responsibility, with the management divided, that is, in charge of the local branches and subsidiaries.

3130 Q. When did you first familiarize yourself with the interests and operations of the company in con-

nection with European matters?—A. That was when I became president in 1938; and really, in the summer of 1938, when I went abroad, was the first time I had taken much interest in the foreign matters.

Q. Did you have occasion at that time to go into those matters in detail?—A. Not much.

Q. When did you first begin to take what might be called a detailed interest in the European matters?—A. Well, that was the time when the Department of Justice wanted to go through our files, and that was in 1942, I think it was.

Q. At that time did the Department of Justice cause a subpoena duces tecum to be served on you for the production of books and records?—A. Yes.

Q. What did you do about that?—A. I called up our counsel, Mr. Williamson, and talked with him about it.

Q. What did you decide to do about it?—A. Decided to let the Government have access to the files.

Q. Was anyone instructed to cooperate with the Government?—A. Mr. Kaegbehn was authorized to cooperate with them in every way he could, and spent quite a good many months with them while they were going through the files.

Q. Mr. Rockwell, when did you first become acquainted with the business of the company related to the American Zirconium Company?—A. In June 1938, I think it was. June 1938 I was elected a director.

Q. Do you recall now how long you served as a director?—A. Until, I think it was, 1943. That is matter of record here.

Q. I want to go through certain of these documents contained in National Lead Exhibit 28 and comment on some of those and then ask you certain questions about it.

Mr. WEBSTER: Page 1 and following, if your Honor please, are minutes of the American Zirconium Company for a meeting held December 20, 1939. The minutes show that Mr. Rockwell was present as a member of the board of directors.

In the middle of the page it is said that the royalty agreement dated January 1, 1935 with the Krebs Pigment & Color Corporation was brought up for discussion, there being brought to the board's attention the substantial amount of royalties which had been paid under this agreement to Krebs Pigment & Color Corporation during the year 1938 and this year. Also in this connection, atten-

tion was brought to the marked decrease in the profits of the corporation this year as compared with previous years; that a larger production seemed necessary to remedy the situation.

3132 And then there was adopted a resolution appearing at the foot of page 1 and carried over to the top of page 2, in which the president of the corporation was directed to confer with Krebs and to insist upon a modification of the agreement with Krebs by the elimination therefrom of all limitation as to quantities of titanium oxide which may be produced and, further, to take such steps as may be necessary to procure such elimination.

Q. Mr. Rockwell, do you recall that matter coming up?—

A. Yes.

Q. Did you vote in favor of that resolution?—A. Yes.

Q. Was there any restriction of the sort referred to in those minutes in the license from the National Lead Company to the American Zirconium Company?—A. Not that I know of.

Q. There is in evidence a letter dated June 16, 1939 signed by you and addressed to Dr. Jebsen—

The COURT. Exhibit number?

Mr. WEBSTER. I am sorry; at the moment I haven't the number.

Mr. DIXON. It is Exhibit 382, your Honor.

Q.—in which this sentence appears: "You know the Glidden Company has a license from us to produce up to 6000 tons until 1941; then they step up to 9000 tons which they are preparing their factory to turn out when the time arrives."

3133 Do you remember that letter?—A. Yes.

Q. Is that an accurate statement?—A. No, that was in error because we had no restrictions, as I found out, on the quantities to be produced.

Q. In these minutes of December 20 there is also reference—

Mr. WEBSTER. If you will just follow this on page 2.

Q.—to the purchase by the Zirconium Company of a towboat and certain other equipment; do you recall that?

—A. That was equipment for operating the plant, getting material around, and so forth.

Q. You were recorded as voting in favor of that?—A. I was.

Q. Also at the end of page 3 there is a reference to a preferred stock dividend. By whom was the preferred stock of the Zirconium Company held?—A. The Glidden Company.

Mr. WEBSTER. If the Court please, the next letter, on page 4, dated November 6, 1939, refers to a different subject, on which I should like to comment.

The first letter in this series, from Mr. O'Brien to Mr. Garesche, is a letter stating that the Glidden Company would like to make arrangements to use the so-called micronizer, which is the apparatus heretofore described, used in the manufacturing process on which the National Lead Company held an exclusive license from the Pulverizer Corporation.

The next letter, page 5, is a response from Mr. Hagar, general sales manager, in which he says:

"We anticipate that there will be no difficulty in working out arrangements whereby your company can investigate the process in which you are interested and go farther with respect to a license should that be desired."

On page 6, Mr. Garesche, in a letter dated November 29, advises Mr. O'Brien of the Glidden Company that:

"We will be very glad to give you full information regarding the operation and installation of this equipment." And he suggests that someone from the Glidden organization call upon Mr. F. J. Shirley, the superintendent at Sayreville:

"Who will be pleased to furnish you with full details." He then says:

"You appreciate, however, that we cannot permit your representatives to view the equipment in operation, for reasons which have been previously explained to 3135 you."

I think the Court will recall that Mr. Garesche took the position that he was obliged not to permit a full inspection of plant operations at Sayreville.

On the next page, 7, Mr. O'Brien, in response, advises Mr. Garesche that it is his understanding

"that the license arrangement will be the same as Krebs, and that the minimum guaranty of 4000 tons will be split equally between National Lead, Krebs and ourselves or that we will pay a royalty of 50 cents a ton on one-third of 4000 tons or 1333 1/3 tons. On any tonnage produced above this the royalty will be 25 cents per ton as per Krebs license."

Of course, the evidence also showed that the National Lead Company incurred considerable expense and applied considerable technical skill and energy to developing this micronizer for use in its titanium pigment business.

And then, also, Mr. O'Brien says that he will in the

future direct Mr. Rhodes of his company to interview the proper party to go into the details of operation, and so forth.

Mr. Rea suggests that I should bring out that National Lead Company was not receiving anything from 3136 Zirconium by way of royalty; that it was required to pay this royalty to the Pulverizer Company.

The COURT. So I observed in the letter.

Mr. WEBSTER. Then on December 20, page 8, an assistant secretary, a Mr. Cobb of Zirconium, wrote to Garesche and said that he had been informed that the micronizer "is in the process of installation" and that he assumes that under the circumstances American Zirconium will commence to report royalties just as soon as titanium dioxide has been treated in the mill.

And then on page 9 he simply accepts Mr. Garesche's comments as to the first 4000 tons and the method of handling the royalties and says that Mr. Garesche's statements would be carried out.

On page 10, in a letter to Mr. Garesche from Mr. O'Brien, reference is made to the exchange of technical information between the two companies, and Mr. O'Brien, on page 10, refers to Article VI and sets that forth verbatim.

Article VI, as your Honor will recall, relates only to the imparting semi-annually of technical information and contains that proviso at the foot which limits the obligations of the parties in that respect where there are prior commitments which would interfere with the full exchange.

3137 Then at the top of page 11 he refers to another article, namely Article VIII, which relates to exchange of copies of application. He refers to the fact that this Article VIII requires exchange of applications two months after filing.

Now the reason for that is shown in the next letter from Mr. Garesche, in response, dated May 23, 1941, on page 12, where he points out that

"The purpose of specifying in Article VII • • • that you should send copies of your patent applications to us two months before filing is not in order to inform us of what you are doing, but is for the purpose of enabling us to forward the applications abroad • • •"

Then in the next paragraph he takes up this matter of the exchange of semi-annual reports and says:

"It appears that the reason for this was that we are so bound by prior obligations that it was virtually impossible

to prepare such reports without including information which we had no right to give."

And then goes on to say:

"Nevertheless, whenever we could, we have endeavored to inform you fully on whatever matters were of interest to you and which were strictly our own to give.

For instance, you will recall that we furnished you 3138 blueprints and even the services of one of our engineers in connection with the installation of the Washburn tank. Another instance which might be mentioned is in connection with the Micronizer——"

Then at the end of that letter on page 13 he suggests:

"as a way of meeting the obligations of Article VI that both companies prepare and submit semi-annual questionnaires to the other, covering points of particular interest to each party and that we exchange such questionnaires and answers."

Mr. DIXON. May it please the Court, I don't want to interrupt Mr. Webster, but I rise to inquire as to whether we will follow the same procedure that we have followed heretofore on these documents, that counsel will be given an opportunity to comment after the entire series is completed or shall we interrupt as we go along? It is immaterial to us.

The COURT. What is your wish in the matter, Mr. Webster?

Mr. WEBSTER. It is immaterial to me. I think it is a matter of convenience of the Court. If you prefer to complete the examination I think it might perhaps be the more orderly way of dealing with it.

The COURT. I have no desire to keep Mr. Rockwell on the stand indefinitely and, of course, if we do cross-3139 comment on each exhibit during the time he was on the stand we would be bound to run into that difficulty. Is it your understanding that you want Mr. Rockwell on the stand during an analysis of all of these exhibits?

Mr. WEBSTER. Yes, your Honor. There are some other exhibits coming up on which I want to ask him certain questions.

The COURT. Then perhaps we had better wait until Mr. Rockwell has concluded.

Mr. WEBSTER. Now the next letter returns to the business as such of the operations of Zirconium. There is a letter dated June 5, 1941, from Mr. Rockwell to Mr. Rogers, Secretary of the American Zirconium Corporation.

Q: Have you got that letter before you, Mr. Rockwell?—

A. I have.

Q. Will you please describe to the Court your reasons for writing that letter?—A. There had been a good deal of discussion about wanting to increase the financing of the company so as to increase the capacity of the plant which we were not in accord with for several reasons, as I set forth in the latter part of the letter at the bottom of page 15, where I give some solutions or suggest some, because we didn't feel that the plant was being operated to the best of economy and that, therefore, we were not in favor of putting more money into the operation.

3140 That had been the matter of discussion before several board meetings and resulted in my letter to Mr. Rogers, who is secretary of the company.

Q. Now at the top of page 15 you suggested a reduction of the management fee from \$25,000 to \$10,000 per annum. Was the Glidden Company receiving a management fee at that time?—A. Yes.

Q. Was Mr. Joyce connected with the Glidden Company?—A. He was the president of the Glidden Company.

Q. Did you have a reason for thinking that the \$25,000 management fee was excessive?—A. The fee was not excessive but they were not getting results.

Q. I notice you also suggest a reduction of selling commission from 5 per cent to 3 per cent.—A. That was because that fee—

The COURT. Who was getting it?

The WITNESS. The Glidden Company.

A. (Continuing) That was above what is ordinarily paid for commissions of that kind.

Q. Were these matters covered by a contract between the Glidden Company and the Zirconium Company?—A. Yes.

Q. Do you happen to recall how long that contract had to run?—A. No.

Q. But it was for a term?—A. It was for a term.

Q. You also suggest a reduction of the interest on the 600,000 preferred shares from 7 per cent to 4 per cent. Was there some reason for that?—A. There was a good reason for that, because the Glidden Company owned all of the preferred stock and was getting the dividends from that, whereas the common stock was paying nothing.

The COURT. Who held the common?

The WITNESS. The Glidden Company.

A. There were three: Glidden, Metal & Thermit, and National Lead.

Q. Now on page 15 you comment on the proposal for changing the process of the Zirconium Company to a rutile type pigment, and then go on to say that the National Lead Company had not brought out a rutile pigment but only a C-pigment of high tinting strength containing the rutile crystal type. Will you tell us what that proposal was and what your opinion was as to that?—A. Well, that was very clear because right in this connection, 3142 where I said that we lacked confidence in the management, they were constantly wanting to change to something, and they were much interested in the rutile type of pigment which had not been produced by the National Lead to any great extent, and to change over on an undeveloped pigment would cost considerable money, not knowing how much. That is why I objected to the rutile type of pigment that then had not been very extensively put on the market; it had been an experiment, to get into it, and it would have cost an unlimited amount of money; untold amount of money, to develop it.

Q. As the representative of a stockholder, was it your position simply that it was bad business judgment for them to go into that pigment?—A. At that time.

Q. You say "at that time." Why?—A. Because it had not been developed; it would have cost a lot of money to develop it.

Q. Does the fact that this proposal was made in the middle of 1941 instead of at some other time, affect your opinion about it?—A. No.

Q. Now on page 15 you requested additional information from the management regarding the proposal for the rutile process and also an estimate of the cost of changes and an estimate of the production cost of new pigment.

Had you been able to get adequate information, 3143 from the Zirconium Company about these matters?

—A. No, and that is brought out in the last line where it says that I asked them not to give a hurried estimate, which was what Mr. O'Brien kept submitting—it was a hurried estimate. We wanted a detailed consideration of it.

Q. In the last paragraph you refer to a discussion which you had with Dr. Hirschland. Who was Dr. Hirschland?—A. I think he is the president of the M. & T. Metal & Thermit Company. He was also a director of the company.

Q. Of the American Zirconium?—A. Of the American Zirconium.

Q. What is the business of the Metal & Thermit Company?—A. Oh, they refine tin, recover tin from various articles, doing a great deal of the recovering of tin from tin cans during the war.

Mr. WEBSTER. On page 17 there is a copy of the minutes of the board of American Zirconium Corporation, of a meeting held June 25, 1941, at which Mr. Rockwell is reported as attending. In the middle of that page the minutes indicate that the ilmenite situation was referred to and discussed at length, and Mr. O'Brien stated that "the supply on hand at the present rate of consumption would last until some time in December, but that he hoped that an additional source of supply would be found, 3144 but he could not give definite assurance to the board" about that.

Q. Do you recall that matter coming up, Mr. Rockwell?

—A. Yes.

Q. What was the situation at that time with reference to supplies to ilmenite?—A. Ilmenite was getting scarce, we could not get it from India any longer, where we had been bringing it from, on account of the demand of the Government on boats for other purposes; so not only they but we were getting short of ilmenite.

Do you care for me to speak about the McIntyre development which preceded this?

Q. No, I will come to that in just a moment.—A. Pardon me.

Q. Other than the McIntyre development, was there any other well established source of ilmenite at this time?—

A. No.

Mr. WEBSTER. On page 18 the minutes report that the president referred to his letter to the directors, dated May 15, 1941, regarding the need of additional capital. And then later on in that paragraph it is stated that Mr. Horsburgh—

Q. Who was Mr. Horsburgh?—A. He was the secretary. I think he is both the secretary of The Glidden Company and was also the secretary of the American Zirconium.

3145 Mr. WEBSTER. (Continuing). "Mr. Horsburgh, after making a rough estimate, stated that with additional capital of \$300,000, the loan of the New York Trust Company and the advance of The Glidden Company of \$100,000 would be paid off and that the other obliga-

tions could be met from the results of operations,"

He was asked to prepare a budget setting forth the estimated income and the obligations, and Mr. O'Brien was asked to prepare a statement answering certain specific questions, asked him by Mr. Rockwell, as to what is being done to assure a supply of ilmenite, whether the use of domestic ores would affect, and the extent, the output of the plant and the cost of operations and necessitate the installation of additional equipment, and what he estimated the quality of domestic ores which could be used, and also those asked by Dr. Hirschland.

Q. With reference to that matter of additional capital, do you recall that matter coming up, Mr. Rockwell?—A. Yes.

Q. What was your position about that?—A. Our position was the same as it had been, that we did not care to put up extra capital for operating the company in whose management we did not have confidence.

Mr. WEBSTER. Now on page 20, if the Court please, there is a letter from the American Zirconium 3146 Corporation to Mr. Rockwell and Mr. Rogers, dated September 8, 1941, giving notice of a meeting to be held September 12: .

"To discuss the proposition of the National Lead Company regarding the development of a supply of ilmenite in Essex County, New York, and decide whether the American Zirconium Corporation wishes to take a participation.

"To discuss and arrange for adequate financing of the American Zirconium Corporation.

"To discuss the plan of increasing the productive capacity of the American Zirconium Corporation to 9,000 tons per annum

"To discuss the matter of purchasing ilmenite for the manufacturing operations of the American Zirconium Corporation from The Glidden Company."

Then on the next page, 21, reference is made to a communication that Zirconium had from OPM who, according to this letter, insisted that the Zirconium Company must have a meeting to come to a decision regarding its participation in the National Lead Company proposition.

Then in the next paragraph Mr. Joyce reports that he explained to the OPM that the Glidden stockholders are extremely anxious to increase the productive capacity from 9,000 tons, but that the directors representing the

3147 Metal & Thermit Corporation and the National Lead Company are reluctant to make the necessary additional investment in the stock to enable American Zirconium Corporation to properly carry out such plans. "They have stated that they are doubtful of a supply of raw material, etc."

Q. Now first, Mr. Rockwell, at this time, did you have under consideration the development of the McIntyre property?—A. Yes.

Q. Did you then know or have an opinion as to when the property would come into active production?—A. We did.

Q. What was that?—A. That was in July 1942, and it so developed that we were able to get going by that time, I think it was 1942. It was the next year. We got producing at the time that we predicted we would.

Q. That is, in the summer of 1942?—A. Yes.

3148 Q. Do you recall the discussion at this meeting or at the meeting referred to in Mr. Joyce's letter about the property of a man named Rhodes, down in North Carolina?—A. Yes.

Q. Did you make any investigation of Mr. Rhodes' property?—A. Yes.

Q. Will you describe what you did?—A. We sent some engineers down there to look over the property, although we had been pretty well advised before that there wasn't the ilmenite down there that was reported to be, and it would cost considerable money to get it out. It was a narrow vein, and while there was some quantity there we could not operate to full extent to get it out in the time required that we would need it.

Q. You say you sent some engineers down. You mean National Lead?—A. The National Lead.

Q. Did you have any opinion as to the propriety of the Zirconium Company taking over that North Carolina property or the wisdom of its taking it over?—A. No, we had no objection to their taking it over if they wanted to develop it.

The COURT. It actually was taken over by the Glidden Company?

The WITNESS. By the Glidden.

The COURT. Not by Zirconium.

3149 The WITNESS. In fact, it shows that Mr. Joyce took it over.

Mr. WEBSTER. That is right. And that is brought out on page 22, as I think your Honor has observed. The

arrangements were made by the Glidden Company to purchase the machinery and equipment and take over the lease from Mr. Rhodes and engage Mr. Rhodes as general manager of the mining proposition.

And then on page 23 there is reference in Mr. Joyce's letter to his willingness to supply ilmenite to the American Zirconium Corporation in a sufficient quantity to take care of its requirements for a 9,000-ton production, this to be supplied at the market price.

Q. Now, Mr. Rockwell, will you refer to the memorandum on pages 24. to 28 of this exhibit? Have you that before you?—A. I have it, yes.

Q. Is that one of the memoranda submitted pursuant to your request for more information about the Zirconium Company in connection with this meeting?—A. Yes. That was the financial statement.

Mr. WEBSTER. This memorandum, if the Court please, contains rather full data about the capitalization of the company and the investment. It refers to the fact that in addition to the stock which the Lead Company had obtained in exchange for the license agreement, it 3150 had made a \$20,000 cash investment in the stock of the Zirconium Company.

Q. Do you recall that, Mr. Rockwell? Do you recall that investment of \$20,000?—A. I recall it, although it was before I had any connection with the company.

Mr. WEBSTER. At the foot of page 25 reference is made to the fact that the company had operated at a loss during 1940. Then the situation regarding dividends and the five per cent sales commission to the Glidden Company, and the management fee is summarized at the top of page 26. And reference is made to the fact that the Glidden contract with Zirconium would terminate December 18, 1943.

Q. Now, Mr. Rockwell, will you turn to page 29, please. Do you recall that there was a meeting on September 11, 1941, at which the matter of the participation of the Zirconium Company— A. That was the meeting of the National-Lead board.

Q. Oh, yes. The National Lead Company. These are minutes of the National Lead Company of September 11, 1941. Do you recall taking up these problems with your own board?—A. Yes.

Q. And do you recall that you were instructed not to vote with reference to the proposal that the Zirconium Company participated in the McIntyre development?—A.

Yes, sir.

3151 Q. And also that you refrain from voting with reference to the proposal for taking over Mr. Rhodes' North Carolina property?—A. Yes.

Q. Do you recall reporting to your own board of directors your own opinion about the business and management of the company?—A. Yes.

Q. And do you also recall, referring to page 31, this reference in the minutes:

"It was further felt that the company should not refuse any reasonably fair offer for the purchase of its interest by other stockholders, should such an offer be made?"

A. Yes.

Q. Was your reason for that the same as you have expressed with reference to these other matters, that you had no confidence in the inmanagement?—A. We were anxious to get out in some way.

Mr. WEBSTER. If the Court please, on page 32 and following there are minutes of the meeting of the Zirconium Company at which was considered the proposal for participation in the McIntyre development, and that the matter was fully presented, that the estimated cost of participation by Zirconium would be about one million dollars, and that Mr. Rockwell stated that production and delivery from the mine was not likely to occur before July, 1942. Then there is also a discussion or reference to a discussion of the proposal with reference to the Rhodes property.

The minutes wind up with a recommendation, page 34, that the American Zirconium Company purchase 10,000 tons of ilmenite from the Glidden Company at \$20 per long ton, and they show the corporation deciding not to avail itself of the offer of the National Lead Company, and that the National Lead Company be so informed.

On page 35 they state that Mr. Rockwell desired to be recorded as not voting on the resolution.

The Court. Did the Rhodes plant ever go into operation?

Mr. WEBSTER. That is next.

On page 35 there is a resolution authorizing the officials of the company to accept the offer of the Glidden Company for 10,000 tons ilmenite, shipment to be made when the ilmenite is available from the Yadkin Valley Ilmenite deposit.

Q. Is that the deposit in North Carolina?—A. I think that is another deposit.

Q. That is another deposit?—A. As I understand it.

Mr. WEBSTER. (Continuing) The price to be \$20 per long ton, and there again Mr. Rockwell is recorded as wishing to be recorded as not voting.

The COURT. What were you paying for ilmenite?

3153 The WITNESS. Ours is more than that, Judge. I think it was about \$28.

The COURT. Was this 10,000 tons ever delivered?

The WITNESS. Well, I don't recall that it was delivered, because I get out of the Glidden Company and haven't followed it; but they had to put a great deal of equipment down there, and I have reason to believe they never did. But that was a small operation then after that.

Mr. WEBSTER. On page 36 it appears that the matter of increasing the production of the plant at Baltimore to 9,000 tons as well as the matter of financing were discussed, and then the memorandum which has previously been referred to is brought out.

Dr. Hirschland stated in behalf of himself, Mr. Rogers and Mr. Smith, that they were prepared to approve the issuance of the 4,888 shares of treasury stock and its offer for sale pro rata to stockholders at \$30 per share.

Then in the next paragraph:

"Dr. Hirschland stated that in his judgment a sale of the 4,888 shares of treasury stock at \$30 per share would produce sufficient funds to care for the company's present requirements."

Q. Do you recall having an opinion about that yourself, Mr. Rockwell?—A. That brings out very clearly that both Dr. Hirschland and ourselves had no confidence
3154 in the management. They had not been able to get up to 6,000 tons in any one year and yet they wanted to extend the plant and expend more money. And that is the reason we objected to putting up more money.

Mr. WEBSTER. At the foot of that page Mr. Horsburgh is reported as stating that the corporation's note for \$275,000 held by the New York Trust Company fell due September 18th next, and that he positively refused to ask the New York Trust Company to renew it; further, he objected to the secretary making such request of the New York Trust Company.

Q. Do you recall who Mr. Horsburgh was?—A. Who he was? Horsburgh was the secretary of the—I said he was secretary. I beg your pardon, because Mr. Rogers was

secretary of the company. But he was one of the vice-presidents of the Glidden Company.

3155 Q. Do you remember why he refused to ask the New York Trust Company to renew the note?—A. He was just trying to force the note to be paid by others, and he said he would not go to the bank again for it.

Mr. WEBSTER. At the top of page 37 it is stated that:

"Dr. Hirschland stated that in view of the unsolved plant problems and the uncertainty as to the supply of ilmenite he was not prepared to approve, at this time, the increase of the plant to 9,000 ton production and the expenditure incident thereto."

Q. I gather that was your opinion also?—A. It was.

Mr. WEBSTER. If the Court please, the next document in here is a copy of a letter from the Office of Production Management, delivered in August 1941, though the date does not appear on the face of the letter, to Mr. Rockwell with reference to the McIntyre project.

Mr. Nelson says:

"In view of the fact that it is desirable to cease importing ilmenite ore from India into this country, in order to release shipping space for other critical and strategic materials, it is the wish of this office to open up domestic production in this country to the point where all
3156 necessary titanium dioxide can be supplied from such sources."

Then below:

"We understand that you are planning to operate an open-cut mine in Essex County, New York, with a proposed estimated capacity of some 180,000 gross tons of concentrates per annum, estimated by you to be about 35% titanium dioxide, to supply your own requirements."

Q. Did you go ahead with that development, Mr. Rockwell?—A. Yes.

Q. Did your company finance that development?—A. Yes.

Q. What is the approximate amount of that investment?—A. About \$10,000,000, but, you understand, all the others were given an opportunity to come in.

Q. Yes, I am coming to that in just a moment.—A. Pardon me.

Mr. WEBSTER. At the top of page 39 Mr. Nelson states:

"We feel that it is desirable in the interests of national defense and in the interests of increasing the amount of titanium dioxide available for civilian uses, for you to make ilmenite ore available to such other manufacturers of

titanium pigments as may desire to obtain the same from you."

Then, below:

3157 "Accordingly, we direct you to offer, for reasonably prompt acceptance, each of the other producers of titanium pigments in the United States the right to participate in the said mining operations by purchasing their ilmenite requirements from you, to such extent as they may indicate, not exceeding, however, a total of approximately 180,000 tons per annum additional estimated capacity. You will make the ilmenite available either by setting up additional units or by allocating a portion of the output of one of your units, in order to supply their requirements.

"We direct you to offer to supply such ore for a period of at least ten years at an over-all cost which shall include the cost of extraction and treatment of the ore," and so forth.

Now at the top of page 40 Mr. Nelson says:

"We understand and appreciate that, to secure participation at this time, you will make no charge for profit, and that you cannot renew any offer on this basis subsequently."

And then, in the middle of page 40:

3158 "In order to avoid any undesirable increase in the price of raw materials going into paint, we direct you to charge your share of the cost of development against the price of titanium pigments over a period of not less than five years.

"In your contracts with the participants, you will give each participant the same privileges with respect to the time of payment of his share of the cost of the development. You will also give each participant, not in default under its contract of participation, the right to suspend purchases of ore for such reasonable period or periods as he may desire, or to discontinue purchases entirely, upon six months' notice in writing."

And then on page 42:

"Since your arrangements with the participants may include further provisions not inconsistent with the foregoing, you will submit to us for clearance, prior to final execution, all contracts between yourself and other participants relating to their participation in this mining operation."

And, finally:

"For your information and files, we enclose herewith

copies of the correspondence between the Honorable John Lord O'Brian, General Counsel of the Office of Production Management, and the Honorable Francis Biddle, Acting Attorney General of the United States, concerning this proposed mining operation."

And then, at the foot of the letter, the enclosures are:

"Copy of letter from General Counsel, OPM;

Copy of letter from Acting Attorney General;

List of manufacturers of titanium pigments."

Then on page 43 we find a letter from Mr. O'Brian, dated August 7, requesting the Attorney General to approve this program.

And on page 44, the first letter from the Attorney General, stating that:

"In my view this program, if carried out in the manner described in your letter and in the documents which accompanied it, would not raise any questions under the Federal antitrust laws."

Then on page 45 is a list of "Other Manufacturers of Titanium Pigments" enclosed in the letter.

Q. Mr. Rockwell, you did carry out that program by making the offer to the other companies listed on page 45, did you not?—A. To the letter, yes.

Mr. WEBSTER. Copy of Mr. Rockwell's letter in response to Mr. Nelson's is on page 46, and on page 48 is a copy of the letter offering participation in this 3160 to the other companies, dated August 14, addressed to the Glidden Company and also to the Sherwin-Williams Company, and on page 50 a similar letter to the United Color and Pigment Corporation, dated August 14, 1941, and at page 52 the same letter, dated August 14, addressed to the du Pont Company.

Finally in this series, on page 54, a further letter from the Attorney General, dated September 23, 1941, approving a relatively minor modification in the arrangement with reference to the du Pont Company, which I do not think needs to be gone into.

Q. Turning to another subject, on page 56, there are minutes of a special meeting of the stockholders of the Zirconium Corporation held September 30, 1941. Will you turn to that, Mr. Rockwell?—A. I have it.

Q. And Mr. Douglas N. Cole is reported as being present as the representative of the National Lead Company, that is, holding the proxy of the National Lead Company. Was Mr. Cole at that time an employee of the National Lead Company?—A. He was my assistant at that time.

Q. In the next paragraph you are referred to as being present as a representative of the National Lead Company. Do you recall being there?—A. Yes.

Q. These minutes relate to what is called a plan of reorganization of the corporation and contain a resolution authorizing this so-called plan of reorganization and authorizing a contract calculated to carry out the plan between the Glidden Company and the Metal & Thermit Corporation and American Zirconium Corporation. Mr. Rockwell, do you recall that matter coming up?—A. Yes.

Q. Just describe to the Court what that relates to and what was done about it, first, with respect to the Metal & Thermit and, second, in respect of the National Lead Company.

The COURT. Would you mind doing that when we resume after a short recess.

(Short recess.)

Q. Mr. Rockwell, just before the recess I had asked you about the plan of reorganization that was proposed at the meeting of the stockholders of the Zirconium Corporation on September 30, 1941; and had asked you to describe it, that is, to tell us about the proposal and why it came up and what your position was with reference to it. Will you do that?—A. The offer was made by Glidden to purchase the shares of the other stockholders by paying with Glidden stock. The American Zirconium accepted but we did not. We had 10 per cent—

The COURT. You mean Metal & Thermit accepted it?

The WITNESS. Metal & Thermit accepted the offer but we did not.

3162 —Mr. WEBSTER. The Court will note on page 58 that the plan is simply for Glidden to exchange 22,700 shares of common stock of Glidden for the 6800 shares of common stock of Zirconium, and that on consummation of the plan, Glidden would become the owner of more than 80 per cent of shares of the common stock and all the shares of preferred stock of Zirconium.

Q. Mr. Rockwell, turning to page 61, what was your reason for not taking advantage of this proposal for a so-called reorganization of Zirconium which would have the effect of a sale of your stock interest in Zirconium to Glidden in exchange for shares of Glidden?—A. We felt that if we had a stock interest there it was more valuable than just the cash offer to take Glidden stock; that we were willing to go along with that if they had

terminated their agreement on any future information or know-how and so forth, but—

Q. Now this correspondence, beginning on page 61, related, did it not, to a dispute between you and Mr. Joyce as to whether you had agreed to go forward with the plan. Do you recall that dispute?—A. Yes.

Q. Just to summarize it, what was the position taken by Mr. Joyce and what was your position?—A. Mr. Joyce claimed that he had gone back to Cleveland, after the meeting, and purchased Glidden stock with 3163 which to buy out the other interest, but we had taken the position from the first that we would not sell on the present basis, so we saw no reason why we should reimburse him for the stock, the Glidden stock, he claims he bought.

Q. Did you have knowledge of the fact that he was going to buy Glidden stock to carry out the transaction?

—A. No, because he was going to exchange Glidden stock. We did not know whether he had to buy, or how much he had in the treasury, in the Glidden treasury.

Q. But if he acquired Glidden stock in this connection, it was not the result of any encouragement he had received from you, was it?—A. Positively not.

Q. Did you take the position throughout this correspondence that the exchange of shares was connected in some way with the license arrangement between your company and the Zirconium Company?—A. Yes.

Q. What was Mr. Joyce's position about that?—A. Well, he thought we had something big up our sleeves and he wanted to take advantage of that, and that he was not willing to terminate the contract then for future arrangements. I assured him we had nothing at the present time, but that was the reason I was anxious to cancel those contracts and agreements with him so as to terminate the whole thing, at which we would have surrendered our stock gladly.

3164. Q. Just to be sure that your reason for this is clearly stated in your own words, I want to ask you a question: What was your reason for not wanting to terminate the license to the American Zirconium Corporation in the event that The Glidden Company came into possession of all or substantially all of the stock of the Zirconium Corporation?—A. Again I say that we had no confidence in their management.

Q. Referring to page 66, at an early stage in this dispute, namely, on October 9, 1941, did you resign as a

director of the Zirconium Corporation?—A. Yes.

Q. And the letter on page 67 shows that that resignation was accepted before October 13th. What was your reason for resigning from the board of directors?—A. Well, we did not care to be represented on their board. They owned all of the Zirconium stock, we had 10 per cent, and there was nothing that a 10 per cent stockholder could do, so I did not want to interfere with anything that they might have under way.

The COURT. Did you ever agree to enter into this exchange agreement?

The WITNESS. On our stock? Yes, only verbally.

The COURT. You had agreed orally?

The WITNESS. We had agreed to, orally.

Q. That was subject to your being able to work out a termination of the license?—A. That is right.

Q. And the purport of this correspondence, which I am not going into in detail, in the interest of saving time, shows I believe that that was a condition of your oral understanding, is that correct?—A. That is right.

Mr. WEBSTER. If the Court please, another subject is brought up on page 81. This memorandum of November 14 to Mr. Turner from Mr. Garesche relates back to that matter of imparting semi-annually information to the Zirconium Company, and the letter of November 14, on page 81, and the letter on page 82, from Mr. O'Brien to Mr. Garesche, dated October 30, 1941. The questionnaire, on pages 83 to 88, shows how that worked out, namely, the Zirconium Company did submit a very full questionnaire and the National Lead Company took steps to respond to it and did respond to it, and Mr. Garesche asked Mr. Turner to give consideration to the advisability of the Lead Company compiling a questionnaire to be answered by the American Zirconium Company, so that Mr. Garesche's previous suggestion as to a means of carrying out the exchange without infringing other obligations that he considered important was implemented in this way.

On page 89, if the Court please, there is another letter from Mr. Kolb, the secretary of the company, calling the Lead Company's attention to a special meeting of the common stockholders of the American Zirconium to be held December 9, 1941 for the purchase of changing the stated value of the common shares to provide a capital surplus sufficient to eliminate the P and L deficit and reduce the net value of patents owned

by the company; to increase the common shares of the company and authorize the sale of the same in an amount sufficient to provide adequate capital for the operations of the company; and to increase the capacity of the plant at Baltimore to 9000 tons of titanium dioxide a year; and the securing of adequate supplies of raw materials; and the expansion of the research department of the company.

On page 91 Mr. Cole suggests to Mr. Rockwell that, on the whole, he thinks the National Lead Company's position would be better protected if they did not participate in the meeting by proxy or otherwise:

"by reason of our lack of information as to the exact effect of Proposal 2, our unwillingness to subscribe to any additional capital under Proposal 3 and the various uncertainties involved in the increase of plant capacity under Proposal 4."

But he winds up by saying:

"On the other hand I see no justification for our opposing any of the proposals."

3167 Q. Mr. Rockwell, in consequence of this dispute did Mr. Joyce make the claim that your company was obliged to either take off his hands these Glidden shares, which he had purchased, or to compensate him for the loss resulting from the decline in the market value of the shares?—A. Yes, he insisted upon that.

Q. Do you recall that that dispute was finally settled?—A. Yes, it was disposed of later.

Mr. WEBSTER. I call the Court's attention to the telegrams and correspondence beginning on page 92.

Telegram from Mr. Rockwell to Mr. Joyce, dated December 9:

"Telephone call at four thirty failed to reach you at office Garesche will telephone in morning at ten."

The connection of that telephone call and telegram is shown, I think, by the telegram on the next page, page 93, from Mr. Joyce to Mr. Rockwell, where Mr. Joyce says:

"YOUR MR. GARESCHE JUST TELEPHONED ME GIVING ME YOUR ENGINEERS REPORT ON OUR MINING OPERATIONS IN NORTH CAROLINA. HE STATES YOUR COMPANY WILL NOT LOAN US TWO THOUSAND TONS OF ILMENITE TO BE RETURNED NOT LATER THAN MAY FIRST UNLESS OUR COMPANY WILL CANCEL OUR CLAIM AGAINST YOUR COMPANY FOR LOSS ENTAILLED

BY REASON OF YOUR FAILING TO GARRY
3168 OUT AGREEMENT MADE WITH MR. ROGERS
CONCERNING ZIRCONIUM CORPORATION
AND UNLESS OUR COMPANY AGREES TO
CHANGE OUR PRESENT ROYALTY AGREEMENT."

And then he goes on to say that they are appealing to Washington for a priority order for sufficient ilmenite to keep the plant in operation, and that if the Lead Company persists in its position, the company will be forced to cease production of titanium dioxide amounting to 600 tons per month, and that Mr. Joyce does not understand the attitude of the Lead Company, and that he is preparing a full statement for submission to proper United States Government authorities. Just what is meant by the word "proper" does not appear in this telegram.

In the night letter on the next page, dated December 10, 1941, page 95, Mr. Rockwell tells Mr. Joyce that National Lead Company's ilmenite situation is precarious; the delay of ore production under Mr. Joyce's program raises serious doubts as to whether any ore loan can be returned; and then suggests that "if such delay is not actual you can yourself supply Zirconium requirements."

Mr. Rockwell says under such circumstances he can recognize no obligation to accommodate Mr. Joyce "during the pendency of the present dispute between
3168a us over Zirconium situation in which you have shown no concern for our reasonable interest."

And then he declines to accept Mr. Joyce's statement as to the nature of that dispute and the present solution, saying they are not fully or accurately stated in Mr. Joyce's telegram.

3169 On page 96 Mr. Joyce advises Mr. Rockwell that he has received 500 tons of ilmenite from du Pont and that Sherwin-Williams has loaned him 200 tons—oh, yes. In response to Mr. Rockwell's night letter or telegram, Mr. Joyce says:

"dupont has loaned American Zirconium five hundred tons ilmenite and Sherwin Williams has loaned two hundred tons to help plant operations,"

and then makes a further appeal for 1,000 tons for immediate shipment, with the understanding that Glidden will cancel the claim against the Lead Company for the loss on the Glidden stock, to which Mr. Rockwell replied, on page 97, in a telegram dated December 11th:

"Glad to accommodate you with one thousand tons returnable not later than May first next upon the understanding stated,"

and he asked him to wire shipping instructions.

Mr. Joyce then replied on December 11th, on page 98:

"Many thanks please ship one car per day for five days starting tomorrow,"
and so forth.

Then Mr. Joyce wrote Mr. Rockwell a letter dated December 11th, which appears on page 99:

3170 "Referring to our exchange of telegrams today, I am very glad to know that we have arrived at an amicable understanding."

And then goes on to comment on the shipments and confirms the understanding that the Zirconium Company or the Glidden Company is to return this ilmenite not later than May 1st next.

The next pages, page 100 and page 101, contain a recapitulation of the most recent exchange of telegrams, and winds up by Mr. Rockwell stating to Mr. Joyce:

"It is a satisfaction to me to have our dispute out of the way and have given instructions that ore shipments go forward as nearly as possible in accordance with your instructions."

"Yours very truly."

The letter on page 102, from Mr. O'Brien to Mr. Garesche, and the letter on page 104, from Mr. Garesche to Mr. O'Brien, dated July 24, 1942, relate to the return of the ilmenite that was loaned and borrowed under the conditions that are described in the previous correspondence.

Q. Mr. Rockwell, do you recall that when this matter of a sale of the Lead Company's shares in the Zirconium Company to the Glidden Company came up, that Dr. Jebesen was in New York?—A. Yes.

Q. Did you ask Dr. Jebesen for a report on the 3171 situation or for comment on the situation?—A. I asked him to review it and give me a synopsis of it.

The COURT. Isn't that memorandum already in evidence as a Government exhibit?

Mr. WEBSTER. It is in evidence.

Q. Had Dr. Jebesen had any previous connection with American Zirconium matters?—A. No.

Mr. WEBSTER. In passing, Dr. Jebesen felt that if the National Lead Company was to take a position with reference to the transfer of this license from Zirconium to Glidden, it should be stated that the license was not transferrable, so that there would be no basis for any claim that Glidden had been misled.

The COURT. I think that memorandum is already in evidence.

Mr. WEBSTER. It is in evidence, your Honor.

Q. Subsequent to this correspondence, Mr. Rockwell in the spring of 1944 did the Glidden and Zirconium companies suggest to you that all the arrangements existing between those companies and yourself be terminated?—A. Correct.

Q. I direct your attention to page 108, which is marked National Lead Exhibit 29 for identification. Is that a copy of the agreement, dated March 9, 1944, terminating 3172 the agreements with the Zirconium Company and the Glidden Company?—A. Yes.

The COURT. It is?

The WITNESS. It is.

Q. In addition to this agreement, did you make any statement to the Zirconium Company concerning their rights to operate under the existing patents of the National Lead Company?—A. Yes, that is, rather a gentleman's agreement, there will be nothing done about the past information and patents they have. It will continue operating.

Q. You will not take any action to stop infringement?—A. No.

Q. With reference to the existing patents?—A. Existing patents.

Mr. WEBSTER. If the Court please, I offer National Lead Exhibit 29 for identification in evidence.

The COURT. Does that go for Glidden or only for American Zirconium?

The WITNESS. American Zirconium.

The COURT. This free license?

The WITNESS. That would be transferred to Glidden now, that information. Let us see, there is a detail, I am not quite sure about—yes, that would be.

Q. You told Mr. Joyce that so far as the American 3173 Zirconium Company is concerned they could operate without fear of infringement?—A. Yes.

Q. Under the existing patents, is that correct?—A. That is correct.

Q. And the American Zirconium Company is still in existence, is it not, so far as you know?—A. So far as I know, yes.

Q. Mr. Re suggests one item with reference to the return of this ilmenite which was referred to a moment ago. Was that ilmenite that was borrowed from you ever returned?—A. It was not.

Q. Mr. Rockwell, after the investigation by the Department of Justice commenced in the summer of 1942, did you do anything about your arrangements with respect to the British company?—A. Yes.

Q. Just tell us what you did.—A. After talking to Mr. Williamson and learning, really, what the matter was all about, I urged him, so far as he could, to try to develop without foreign interests a situation that would correct what the Attorney General's office was complaining of. Now, that has been very largely accomplished with England and about ready to straighten out with Canada.

Q. Have you been able, as a consequence of that, to arrive at a basis of agreement with the English company?—Yes.

3174 Q. Have they indicated to you and have you indicated to them that you are prepared to enter into a new form of agreement with the British companies?—A. Yes; and they have indicated to us that they are willing to modify their agreement.

Mr. WEBSTER. I ask to have this marked for identification.

(Marked National Lead Exhibit 30 for identification.)

Q. Mr. Rockwell, I show you National Lead Exhibit 30 for identification, which appears to be a form of agreement in blank as to date between the Imperial Chemical Industries, Ltd. and Imperial Smelting Corporation, Ltd., Goodlass Wall and Lead Industries, Ltd., Titan Company, Inc., British Titan Products, Ltd., and National Lead Company, and I ask you if that is the form of agreement on which you, that is you, the National Lead Company, and the British companies have come to a conclusion?—A. Can I accept your statement that this is the agreement we worked on?

Q. Yes.

The COURT. You ought to know Mr. Webster by this time.

The WITNESS. May I appeal to the Court? If that is so, why, I will say Yes.

3175 Q. I think you can accept my statement that this is the form of agreement prepared by your attorney, Mr. Williamson.—A. Yes.

Q. And are you ready to execute this agreement at a convenient time?—A. Yes.

Mr. WEBSTER. If the Court please, I offer this form of agreement in evidence.

The COURT. If there is no objection, it will be received.

Mr. DIXON. We haven't even seen it, your Honor.

Mr. WEBSTER. Excuse me. I will give you a copy in just a second.

I think our competitors are probably entitled to see it, being parties to the case. We are showing them things we haven't shown them before. There is some delicacy about it.

(Marked National Lead Exhibit 30 in evidence.)

Q. Are you at the present time engaged in discussions with the Canadian Titanium Pigment Company and its representatives and C.I.L. with reference to a similar revision of the Canadian arrangements?—A. Yes.

Q. Do you recall, Mr. Rockwell, giving your attorneys any suggestions concerning a revision of the arrangement between your company and the International Pulverizing Corporation, relating to the use of the micronizer?

3176 —A. Yes.

Q. Has that been reduced to the form of a new agreement with the International Pulverizing Corporation?

—A. I think it has.

Mr. WEBSTER. I ask to have this marked for identification.

(Marked National Lead Exhibit No. 31 for identification.)

Q. Mr. Rockwell, I show you National Lead Exhibit 31 for identification and ask you if that is a copy signed by Mr. A. M. Stackhouse, president, on behalf of the International Pulverizing Corporation, and by yourself as president of National Lead Company, dated October 20, 1944, being an agreement between International Pulverizing Corporation and National Lead Company?—A. I will accept that.

The COURT. What is the substance of the agreement?

Mr. WEBSTER. The substance of the agreement is, if the Court please, a revision of the license arrangements so as to give the National Lead Company only a non-exclusive license.

The COURT. Are you offering it in evidence?

Mr. WEBSTER. Yes, I offer that in evidence.

Mr. DIXON. If the Court please, an examination of this document indicates that it has been executed on
3177 October 20, 1944, which was certainly subsequent to the date of the filing of the petition. I haven't had a chance to examine it, but, to that extent, we feel it would be objectionable at this time.

The COURT. A decree in equity, you know, speaks as of the date of the decree. Consequently, as far as admissibility is concerned, regardless of what other consequences

it may have, as far as admissibility is concerned, I think it would be admissible if he produced an agreement of the morning of the day the decree is about to be entered. Admissible.

(Exhibit NL 31 for identification received in evidence.)

Q. Mr. Rockwell, did you take advice of your attorneys or counsel in respect of the agreements between, or involving your company and certain German and French and other foreign companies?—A. I have taken counsel, but I think that is a legal question I cannot speak for.

The COURT. You have taken their advice? At least you have consulted with them?

The WITNESS. Yes, I have consulted with them.

The COURT. That is what I understand the question to mean.

Mr. WEBSTER. That is all.

The COURT. Chances are you talked to nobody but
3178 lawyers in the last couple of weeks.

Q. Have you been advised that the agreements with the German company, for example, have been terminated by virtue of the war?—A. I would understand that.

Q. Have you, may I say, discounted your investment in the stock of the German company?—A. 100 per cent.

Q. Have you taken a similar position with regard to your stock in the French company?—A. No.

Q. You think that there is some prospect of the French company being able to revive after the war?—A. May be.

Q. Now how about the investment in the Japanese company—have you written that down to some extent?—A. That will be in the same category with the German.

Q. Have you any intention of resuming after the war any of the territorial restrictions contained in any of the foreign contracts?—A. No.

Q. Have you any intention after the war of granting exclusive licenses under patents?—A. No.

Q. For use in foreign countries?—A. No.

Q. Or exacting exclusive licenses for operations in the United States from any of your former foreign associated companies?—A. No.

Mr. WEBSTER. It has been suggested, if the Court please, that in order to save some time and to give a very accurate
statement of the setup of National Lead Company
3179 and the manufacturing interests it has, the branches
and the nature of its production both in the pigments
field and outside, that I have marked in evidence pages
18 to 22 of the report of the company for the year ending
December 31, 1943.

The COURT. No objection, is there?

(No response.)

The COURT. Very well.

(Marked Defendant NL Exhibit 32.)

Mr. WEBSTER. No further questions.

The COURT. To what extent is the public interested?

The WITNESS. You mean stock interest?—A. 100 per cent.

The COURT. Generally distributed.

The WITNESS. Yes.

Cross examination by Mr. DIXON:

Q. Mr. Rockwell, I take it from your examination or answers to Mr. Webster's questions that you are rather familiar with the operations of the American Zirconium Corporation?—A. Fairly.

Q. Just how much time other than attending the directors' meetings of American Zirconium did you have occasion to spend investigating the operations of the plant of American Zirconium Corporation?—A. Not much.

Q. Did you ever visit their plant in Baltimore?—
3180 A. No.

Q. Were you familiar with the license agreement which your company had with American Zirconium Corporation?—A. Only in a very general way.

Q. Do you recall where you first got your information that there was a restrictive provision on the production of American Zirconium Corporation?—A. I got that from the American board meetings, where they began to want to get an increase in their plant.

Q. Do you recall when those discussions for an increase in the production of Zirconium first took place in the board meetings?—A. If I could refer to this record I could give it to you exactly.

Q. Yes, I will be glad to have you do that.—A. The meeting of December 20, 1939, or the meeting before that, is the first that I knew of, that.

Q. You say that is the first time you knew of the restrictions on American Zirconium's production of pigment, titanium pigment?—A. Yes.

Q. About how much money did National Lead actually have invested in this company, if you recall?—A. \$20,000.

Q. And they had received some dividends, had they, on their stock?—A. Yes.

Q. Do you recall the amount?—A. No.

3181. Q. Well, the American Zirconium Corporation did pay some dividends prior to 1939 on their stock, didn't they?—A. Yes.

Q. Now you felt, however, that by inefficient management they were losing money; that was your position, wasn't it, Mr. Rockwell?—A. Yes.

Q. And it is a fact, is it not, that Mr. Joyce wanted to increase the production of the company to put it on a more efficient basis?—A. That was his claim.

Q. Now about the time these discussions took place in the board meeting of American Zirconium I believe there was a reference to Zirconium producing or wanting to produce a new rutile pigment. Do you recall those discussions?—A. Yes.

Q. And I believe from your position taken in the minutes you felt that some of this money that Zirconium wanted which would be used to create additional facilities to provide for the manufacture of this new pigment, should not be spent by the new company, is that correct?—A. Yes. Not on new—you mean to be spent on new development?

Q. On this new rutile pigment.—A. Well, he never put in a figure sufficiently large enough for that.

The COURT. He suggested that it cost \$300,000; you thought that was an inadequate figure?

The WITNESS. An inadequate figure. And you see in there this shows that that did not include the cost
3182 of equipment for rutile pigment.

Q. Was National Lead Company producing a rutile pigment at that time?—A. Only to a limited extent. It was what they call a composite pigment, not pure.

Q. That was being produced under the so-called Tilman patents?—A. I can't answer that. It is a technical matter.

Q. They were the new rutile patents acquired from TG; do you know anything about that, Mr. Rockwell?—A. No.

Q. Do you know whether the du Pont Company was manufacturing on the market any so-called rutile pigment at about the same time?—A. I understood they were.

Q. Under your license agreement with the Zirconium, that company was not to get any patent applications of the National Lead or Titan companies, was it?—A. I will have to plead ignorance on a good deal of that patent agreement matter.

Q. Did you ever inquire of any of the Zirconium officials to see whether or not the patents, that is the applications of the National Lead, were made available to Zirconium?—A. No.

Q. You never made it your business to find out whether they had access to those applications, did you?—A. No.

Q. You know as a fact of course that under the National Lead-du Pont agreement those applications were made available to the du Pont Company, don't you?
3183 —A. Not from actual knowledge.

Q. You say not to your knowledge?—A. No.

Q. Did you ever have occasion to examine the agreement between the National Lead Company and the du Pont Company in 1933?—A. No.

Q. So that you never made it your business, I take it, to inquire as to whether the facilities of the National Lead were available to Zirconium under its license agreement in so far as patent applications were concerned?—A. No.

Q. I believe you testified at some length about this McIntyre project and discussions had with the Glidden Company or the American Zirconium board members in 1941. Do you know whether under that project producers like American Zirconium Corporation were to be required to contribute any capital to that project?—A. Contribute capital or pay a certain amount for the material.

Q. And I believe you pointed out to the Glidden Company or the American Zirconium Company at the meeting that in July or thereabouts of 1941 it would require an expenditure of about a million dollars on the part of American Zirconium Corporation to go into that enterprise?—A. That is right.

Q. And at that time there was some discussion among the board members about methods of raising additional funds which you had already discussed to continue the operations and to expand operations?—
3184 A. Yes.

Q. Do you recall whether any statements were made in the board meeting about the requests for Zirconium to increase its production having been made by the Government to American Zirconium Corporation?—A. That was a statement made by Mr. Joyce.

Q. You had no occasion to believe that it was not true, did you, Mr. Rockwell?—A. No.

Q. But this McIntyre project was not opened up until about July, 1942?—A. Yes.

Q. When did you first begin to get useful ore from that project?—A. I think it started in July, 1942. We started very close to schedule.

Q. And the Zirconium management thought they could get their ilmenite from other sources without having to

put up a million dollars prior to that time, did they not?—A. Yes.

Q. And it was also provided that if ilmenite could be acquired for Zirconium at prices equal to or lower than that at which the Glidden Company was willing to supply it, that such prices would be those charged by Glidden to Zirconium for any ilmenite given to Zirconium by Glidden?—A. I did not quite follow that question.

Q. In other words, if the Glidden Company was
3185 to supply Zirconium with the ilmenite, it would not charge for that ilmenite any more than any other producer of ilmenite in the United States would charge for a comparable product?—A. That was their claim.

Q. And that was their statement, was it not, in the record of their meetings?—A. Yes.

Q. I believe you testified that you wanted to cancel this contract with Zirconium in order to cancel the exchange of know-how, so-called, between the companies, is that correct?—A. On future—

Q. On future know-how?—A. For the patents in the future; know-how.

Q. You mean just the patents?—A. Yes.

Q. In other words, you did not want to exchange the future patents?—A. Any patents or agreements relating to the future.

Q. Up to that time the National Lead Company had been securing all of Zirconium patents and patent applications, had they not?—A. I presume so. I don't know. That would be a matter of record.

Q. There were several discussions between you and Mr. O'Brien about being able to witness a so-called Washburn attack at one of your plants, were there not?—A. Yes.

Q. You would regard that as falling within the scope of technical information, would you?—A. We sent our
3186 men to his plant to establish that.

Q. They wanted to see one of these operations, didn't they?—A. Yes.

Q. And you advised Mr. O'Brien that your obligations prevented you from enabling them to witness such operation, didn't you?—A. That is right.

Q. Can you state to the Court what those obligations were?—A. Just according to the agreement. I am not familiar enough with the agreement. But we took no one into the plant.

Q. What agreement now are you talking about?—A. I am talking about the titanium agreements that this whole case is predicated upon.

Q. You mean the agreement between National Lead and du Pont?—A. I would say the whole agreement; whether it is 1920 or 1933, I can't say, but it was the titanium agreement that was had between the various interests.

Q. You mean all of those agreements prevented National Lead from enabling Zirconium to witness the attack,—I mean, whatever is in those agreements?—A. Yes.

Mr. WHITNEY. I think I will have to object. These agreements are all in evidence. They are several hundred pages long.

The COURT. Yes. All I can let this witness say is if he was the one who objected to the inspection, as to 3187 whether that was the reason that was in his mind.

The WITNESS. That was—yes.

The COURT. You were the one that objected?

The WITNESS. I was not the one, because I had nothing to do with it. It is our local management.

Mr. WEBSTER. The record shows that Mr. Garesche, who was the manager of the Titanium Division, was the man concerned with these matters.

The COURT. Were you consulted on it?

The WITNESS. I don't know as I was consulted on that particular one, Judge.

The COURT. If you were, you took Mr. Garesche's statement that it was not all right to do it—

The WITNESS. Yes.

The COURT. And you said, "Well, in that case don't do it"?

The WITNESS. That is it.

Mr. DIXON. That is all.

The COURT. Your chief interest in the administration of the company lies in the production angle or—

The WITNESS. No. The production-financial, that whole end of it.

The COURT. You have not been giving very much attention, however, to these agreements?

The WITNESS. No. These are details that are 3187a handled by the various branches and departments.

The COURT. You have not concerned yourself with that?

The WITNESS. No, I have not.

The COURT. Any questions?

Mr. WHITNEY. No thank you.

Mr. WEBSTER. I have no further questions.

The COURT. You are excused, sir.

(Witness excused.)

3188 IMRIK DEVEGH, called as a witness on behalf of the defendant National Lead Company, being first duly sworn, testified as follows:

Direct examination by Mr. WEBSTER:

Q. Mr. DeVegh, where do you reside?—A. In New York City.

Q. What is your profession?—A. I am a consulting economist.

Q. Where did you receive your professional education?—

A. At the Universities of Budapest, Hungary, Leipzig, Germany, and Cambridge, England.

Q. Did you take a degree at the University of Budapest?

—A. Yes, I took a Ph. D. at the Faculty of Law.

Q. Was there any reason for your taking that degree under the Faculty of Law?—A. Yes. The University of Budapest was organized in the four mediaeval faculties, theology, law, philosophy and medicine, and the Faculty of Law gave the course on economics.

Q. Did you also take the course in law as well as the course in economics?—A. Yes, I did.

Q. When did you receive that degree?—A. In 1928.

Q. Then you went to Cambridge, England?—A. That is correct.

Q. What was the nature of your work at Cambridge?—

A. I went to Trinity College at Cambridge to get a
3189 Ph. D. in economics from the University of Cambridge. I spent a year there and then I had an opportunity to come to this country, and then I abandoned my further Ph. D. ambitions and came to the United States.

Q. Of what country are you a citizen?—A. Of the United States.

Q. How long have you been a resident of the United States?—A. Since 1931. I became a citizen in 1937.

Q. Have you practiced your profession in the United States since your arrival here in 1931?—A. Yes, I worked for ten years with an investment counsellor firm, Scudder, Stevens & Clark, in New York, and then in Boston. I worked in their research department. For the first seven years that I was there I did all their foreign research, which consisted largely of the following of operations of American corporations abroad, foreign subsidiaries and participations, and world business trends in general, questions of foreign business organizations and large enterprises in western Europe, Canada, and Latin America.

Then for the last three years that I was there, from 1940 to 1942 inclusive, I was in charge of general economic research and business forecasting. They had a very substantial research budget and that meant that I was the central coordinator for their research, economic research that is.

3190 Q. I think most of us know, but for the sake of the record, what is the nature of the business of the firm of Scudder, Stevens & Clark?—A. Investment counsel. In other words, they advise large investors on their investment portfolio. They are the oldest and largest firm in the country.

Q. Subsequent to the ten-year period with Scudder, Stevens & Clark, what did you do?—A. I became assistant to Mr. Charles E. Wilson, then Production Vice-Chairman of the War Production Board.

Q. What was the nature of your work with Mr. Wilson?—A. Research work, economic research work on various aspects of the war program.

Q. When did that connection terminate?—A. I left the War Production Board in July 1943.

Q. And since then?—A. Since then I have had my office in New York.

Q. Are you a member of any professional societies or organizations?—A. The American Economic Association, the Econometric Society, and the American Statistical Association.

Q. Have you written articles for professional publications on economic subjects?—A. Yes.

Q. Are you the author of the book entitled, "The Pound Sterling," that was published in New York in 1939?—

3191 A. That is right.

Q. Are you the author of an article entitled, "Imports and Income in the United States and Canada," in the Review of Economic Statistics for August, 1941?—A. That is right.

Q. Can you name several other papers of a professional or Technical character that you have written or presented?—A. Yes. I have written several papers for the American Economic Review which is the periodical of the Economic Association. I had a paper on "Savings-Investment and Consumption," at the Annual Meeting of the Association in 1940. Then I was asked to do a paper on the Keynes Plan called the "International Clearing Union." That was in the September 1943 issue.

Then I have another paper in the March 1945 issue on

the Bretton Woods Agreement. That will be in the March 1945 issue. Well, I recall one in the Investment Counsel Annual for 1941, I think, or 1940, I will say, on income distribution. In other words, they are largely either on international trade, or international payments, or on income distribution questions.

I don't know that I have to state more, but that is about the substance of it.

Q. Have you made a study of current publications in the United States on the so-called cartel problem?—

3192 A. Yes. I am familiar with that. I am familiar with the TNEC material, the Kilgore Committee material, the Murray Committee report last month about the post-war economic questions. I have not read of course all the TNEC hearings, but I am substantially familiar with the monographs. For instance, Monograph No. 40 is on foreign business practices. There is also a monograph on competition and monopoly in American industry. Then there is at least one volume of hearings on cartels. There are also several other volumes of hearings I think on patents, but I am not sure, I don't remember that.

Q. Have you read the monograph by Mr. Corwin D. Edwards of the antitrust division, Department of Justice, entitled "Economic and Political Aspects of International Cartels"?—A. Yes, I have.

Q. Have you read the Hearings before a Subcommittee of the Committee on Military Affairs of the United States Senate relating to scientific and technical mobilization and particularly to monopoly and cartel practices?—A. I believe so. I think there are several volumes of these. I am not sure which volume you are referring to.

Q. Have you examined a book entitled "Cartels", by Mr. Wendell George?—A. Yes.

Q. Published in 1944?—A. Yes.

Q. Have you been asked by me to make a study
3193 of foreign trade and industrial organization with reference to particular questions in connection with this case?—A. Yes.

Q. Now before that had you familiarized yourself as an economist with the literature concerning the organization of industry in, say, England and Germany?—A. Yes.

Q. Since my request to go into these matters have you made a further study of that literature?—A. Yes.

Q. Now I wish you would please explain to the Court or describe to the Court the literature relating to the organization of British industry, first for the period prior

to the first World War. Will you do that?

The COURT. How far back do you want him to start?

Mr. WEBSTER. Well, I simply asked him to describe the literature which I think will not—

The COURT. I say, that literature goes back a very long time. I don't know how far back you want him to go.

Mr. WEBSTER. I just asked him the question to—

The COURT. All right, I will take it.

A. Well, the most comprehensive and most fundamental history, economic history of England, of industrial England, is J. H. Clapham's work, which is called "Economic History of Britain," and part 3 deals with the period 1887-1914. That is a very bulky volume, 3194 about 600 pages, but it contains in substance most of the relevant information with respect to the organization of British industry. Its point of view is evolutionary rather than organizational. It deals with history, at its title says, rather than questions of organization as such.

The literature of the organization or combination movement, if you will, begins with Nacrosty's books—one is called "The Trust Movement in British Industry," and the other is called "Trusts and the State."

Then D. H. MacGregor wrote two books, one on "Industrial-Combination," in 1906, which is rather a theoretical book, and then another one, "Enterprise—Purpose and Profit," in 1934. But both of those are more theoretical. The final book on industrial organization before the war is Herman Levy's "Monopoly and Competition," which was published in 1911.

Q. Do you happen to know whether Mr. Levy is still alive?—A. I do not know. He must be a very old man. He was then professor at the University of Heidelberg. I think he fled to England when the Nazis came in, because he published a book there in 1936. Otherwise, I don't know. This book on "Monopoly and Competition," was republished in a revised edition in 1927. And then he wrote a book on "Industrial Germany" in 1934, I 3195 believe, which was published in England—or 1935, possibly; I am not sure of the date. This is in substance the most important. There are, of course, numerous minor treatises, sometimes quite revealing.

Q. Mr. DeVegh, based on your study of these materials and your professional consideration of them, are you in a position to summarize the organization of British industry at various periods?—A. I believe so.

Q. Now will you please summarize as briefly as you think the subject permits, the organization of British industry prior to the first World War?—A. Well, the industrialization in England goes back further than in the United States and Germany. England was the low cost industrial producer of the mid-nineteenth century and developed along highly competitive patterns. There had existed monopolies before, and of course cartels have existed in England. Before there was a very famous English coal cartel which ran from 1770 to 1844, called the Newcastle Coal Vend. But essentially, in the mid-nineteenth century and during the third quarter of the nineteenth century England was, English industry was more competitive than any others. This was generally attributed to the effects of free trade and to the fact that British costs were very low, and a very large number of enterprises sprang up in every industry during the 3196 period of rapid development. England was the pioneering country in industry in the nineteenth century and that pioneering was rather exuberant in all directions.

In the first decade of the present century, however, there began to develop some very large combinations and mergers of existing enterprises and also increasingly numerous cartel agreements. These were partly prompted by technological considerations, namely, the compelling advantages of large size in production, and they were partly defensive against supposed German and American competitive pressures.

The authors most frequently quote the cases of the whiskey trust and industrial alcohol cartelization and the combination of wall paper manufacturers, which is a virtual monopoly, the associated Portland cement manufacturers' combine and various others.

Levy in his book describes some fifteen such combinations in great detail which he considered most typical.

Robert Liefmann, who is the principal author on German cartels, in one of his earliest papers published in 1897 on combinations of entrepreneurs, lists some forty international cartels which existed before 1896, and in twenty-two of them German and English industrialists participated. In other words, to that extent international 3196a cartelization had already made substantial progress in England.

The COURT. Is this a convenient place for you to pause?
The WITNESS. Yes, sir.

The COURT. We will suspend now.
(Recess until 2:15 p.m.)

3197

AFTERNOON SESSION

IMRIE DEVEGH, resumed the stand.

Direct examination continued by Mr. WEBSTER:

Q. Mr. DeVegeh, just before the noon recess you were discussing the organization of British industry before the first World War. Will you please complete that and then describe what occurred during and as an aftermath of the first World War?—A. I mentioned a number of the cartels and trusts that were listed and discussed in some detail in the book by Herman Levy, and I think I only ought to add to that two quite different developments which antedated somewhat Levy's book. In 1893 George Elliott, the coal owner, wrote a letter to the London Times, which at that time was considered sensational, suggesting the establishment of a national coal monopoly. While nothing came of that at the time, in 1896 D. A. Thomas, later Lord Rhondda, one of the Welsh coal barons, put out a second proposal. I will read its title because it is quite characteristic and rather long:

"Some notes on the present situation of the coal trade with a plan for prevention of undue competition and for maintaining prices at a remunerative level," and discussed at length, but nothing eventually came of it, and the coal trade remained unorganized.

By 1914, however, the organization movement in British industry had gone very far, so that Clapham actually made some very sweeping statements and said:

"By 1914 there was hardly a British trade in which there did not exist an association of some kind", and from the viewpoint of terminology, I think I ought to add that I do not believe that he meant purely trade associations; in other words, I mean, the word "association" I think in Clapham's mind, so far as I read the book, means association of a regulatory kind.

The reasons why this should have been done are rather complicated. The essential argument why British industry was not susceptible to monopoly and cartelization was that free trade permitted competition from abroad and competition from abroad would prevent the rise of cartels and monopolies.

This had been undoubtedly the case in a number of in-

dustries, but the result of appearance of competition from abroad almost invariably subsequently was the imposition of either special legislation or tariff protection. We are going to come to that in discussing the developments of the 20s.

In certain industries British costs were decisively the lowest in the world and, therefore, foreign trade was not a threat towards the end of the Nineteenth Century and only became a threat during the Twentieth Century.

This whole question of the transformation of British economy from the world's industrial monopolist as a nation, freely competitive within that framework, to a position when the English have lost their monopolist position as an industrial country, but then tried to compensate for this loss, compensating by rapidly increasing organization of British industry and the rapidly increasing exploitation, as it were, of the domestic market, is really the substance of this evolution from 1890 odd until 1914.

Well, then, from 1914 to 1919 there occurred a very dramatic change or, rather, a further development which is very fully described in the famous report of the Committee on Trusts, which came out in 1919.

The British Ministry of Reconstruction in 1918 appointed a committee to study the trust problem, as they called it, and this committee wrote the report in 1919, which is the fundamental source of information of what happened to British industry up to that time and what the situation in British industry was at that point.

The report of the Committee on Trusts says in substance that the necessities of the war have caused every industry to form trade associations, where none existed before, and to strengthen associations that were already in existence; that the Government agencies found it much simpler to deal with trade associations rather than with individual war contractors and that, consequently, a well-entrenched trade association network was created very much under Government prompting and with Government encouragement; and that this was very comprehensive. And the report itself says that, although the associations were created under pressure of war, there is little doubt that they will continue after the war for entirely different purposes.

The main body of the report describes the trustification and cartelization of the British economy under the war

exigencies in some detail, and there is a very interesting addendum to it, which was written by the four liberal—well, “liberal” is the wrong word, because there was a liberal party in England. Let us say the four radical, or four leftist members of the committee, namely, Mr. Ernest Beven, who is now a member of Mr. Churchill’s Cabinet, Sidney Webb and J. A. Hobson, the economist, and a Mr. Watkins—I don’t know who he was—and those four wrote an addendum in which they said that they had signed the main report because they completely agreed with everything it says, and then they go on and say that this, however, is not enough; the report does not state 3201 the facts of the case nearly strongly enough; the fact is, as they say, that free competition has practically disappeared from British industry. Moreover, they say that this result is not disastrous; that after all free competition produces waste and is even uneconomic and unsound, if you will, I forget now the exact wording, but the important thing is, that the public interests should be better protected than they are under the present system and that, therefore, the committee should have made further recommendations with respect to the protection of the public interests.

The COURT. A perfectly logical position for a man of Sidney Webb’s socialist philosophy.

The WITNESS. Yes.

A. (Continuing) That addendum was followed by other papers of which two are particularly interesting, one by Mr. James Hilton—I forget now whether it was John or James—but, anyway, Mr. Hilton, secretary of the committee, and the other one by Mr. Percy Ashley, now Sir Percy Ashley of the Board of Trade, who then go on to describe in some detail the actual extent of cartelization of British industry, analyze a number of cases, and interpret them as a fairly general and all-inclusive movement.

I have the report with me, but I do not think 3202 that there is any point in my reading any of it.

Q. I just wanted to mention, without interrupting the course of your discussion, do you remember there are comments on the factors causing combination under a subtitle called “Influence of War Conditions on Combinations” in one of the addenda?—A. Yes. I don’t remember now exactly what they said, and I would much rather produce the document and read it, if I may.

Q. Tell us about the first decade between the two wars.

1920 and 1930. What was the situation in England industrially during that period?—A. During that period the most interesting fact is the relative industrial decline of England, the stagnation after the depression from 1921 on, and the resultant very strong intensification of the tendency to cartelize, to organize industry, and to promote even State-sponsored monopolies. There was the Railroads Act of 1921, which merged compulsorily all the railroads of England into four systems. Then in 1923 the Committee on Civil Aviation recommended merging all civil aviation enterprises into a monopoly, the Imperial Airways. In 1920, the Dyestuffs Import Quota was imposed and in 1926 Imperial Chemical Industry was formed, very strongly encouraged by the Government. The enterprise was completely privately owned but the Dyestuffs protection was maintained, and I think 3203 there are numerous statements to the effect that the measure was encouraged by the Government, viewed by the Government with favor, especially because of the importance of dyestuffs, and this came out also in the League of Nations World Economic conference papers on the description of the chemical industry.

Q. Do you mind pausing just a moment to describe or to indicate the principal sources of information about this period in England?—A. First of all, there are the various statutes themselves, the Railroad Act of 1921, then the report of the Civil Aviation Committee, that I mentioned, then the report of the committee on the coal industry in 1926, the Coal Industry Act of 1930, the British Sugar Subsidy Act of 1925, which organized the beet sugar industry, then, of course, tariffs in the various finance acts. In 1915 England introduced the so-called McKenna duties which were the first duties on manufactures. I will come back to that later on.

Then in 1921 came the so-called Key Industry duties. I think there are numerous books on the subject, Fitzgerald's "Industrial Combination in England," published in 1927; then Plummer's "International Combination in Modern Industry," published in 1934, republished in 1938. "Alfred Plummer, International Combination in Modern Industry."

3204 Then, in part, I think there is material in TNEC monograph No. 40, but I think that is only about coal and cotton.

Q. Do you recall the liberal industrial inquiry?—A. Oh, yes, the Liberal Party in 1928 published a report called

the "Liberal Industrial Inquiry"—called "Britain's Industrial Future," sub-title being "The Liberal Industrial Inquiry," and this was the official pronouncement of the labor party, which had been challenged by both its conservative and its liberal opponents about what Liberalism can contribute to the solution of Britain's very serious industrial problems.

As we recall, England did not share in the world recovery and was the first industrial country to develop chronic unemployment.

It has a section on "Industrial Combination," where it says that, of course, the public interest should be protected but this protection of the public interest does not mean that combinations should be made unlawful and that, in fact, wasteful competition and all the other evils of competition, have to be checked, and that, essentially, all that is necessary is publicity for cartel agreements and other, well, trade association moves. Then it goes on to say that

trade associations in particular should be supervised by the Board of Trade and should be formed whenever 50 per cent of an industry wants them, and when 75 per cent of an industry wants a certain rule to be enacted by this trade association, then, subject to the sanction of the Board of Trade, the trade association should be able to compel 100 per cent of the industry to take the required measure.

And I think that this is, as a matter of fact, a very interesting document because it goes to show to what an extent the orthodox liberal thought had relinquished its original free competitive position by 1928 which, after all, was still the high point of the liberal come-back in economics, I mean, it was the peak year of European recovery after the first World War.

The British Government, however, was not controlled by the Liberal Party at any time after the fall of Lloyd George in 1922 and did not give much consideration to what might be described as philosophical conceptions with respect to competition. It went ahead and organized as best it could every industry that it thought required organization. I have already mentioned the sugar industry, the coal industry, the cotton industry, the iron and steel industry, civil aviation, chemicals, and I think I ought to mention now the import duties that were imposed very definitely with the idea of protecting the home market and developing in the home market new industries for defensive or other purposes.

The first industry tariff was the McKenna tariff.

in 1915, which put a rate of $33\frac{1}{3}$ per cent on automobiles, cycles, musical instruments and flat rate on films. I think that was the entire list. There may have been something else too, but, in the main, that was duty to exclude luxuries in war time, but then they were maintained after the war, and a very large number of additional items were added in the Key Industries Duties Act, or words to that effect, of 1920 or 1921. I am not quite sure now whether it was 1920 or 1921. There a large number of items, specified types, of machinery, were placed on the protective list with the rate of $33\frac{1}{3}$ per cent, optical instruments with a rate of 50 per cent, magnetos, I think, also with a rate of 50 per cent, and these industries then, under this protection, did develop quite fast.

There is a book by Mr. Frederick Benham called "Great Britain Under Protection," which was published in New York in 1941 and gives full detail regarding this evolution. There is also a book published by the Cambridge National Economic Research Bureau, that is, Cambridge, England, not to be confused with the National Bureau of Economic Research in this country, although it is the English equivalent, that was called "Trade Regulations of the 3207 United Kingdom," which came out in 1943 and gives a complete list of both the changes in tariff regulations and special treatments for special industries, like the dyestuffs industry, which I mentioned before, and also a list of commercial treaties, quota agreements and so forth entered into.

Both those books are much more important, of course, from the point of view of the 1930s, when the integration of British industry along more concentrated lines proceeded.

Q. Will you go on into that discussion with regard to the facts about the concentration of the 1930s?—A. The great difference between the 20s and 30s is that the 20s were the decade when privately-controlled combinations completely entrenched themselves in British industry and where correct behavior, which means correctly non-competitive behavior, became a very well established matter in British industry.

The British Government only took action in those, maybe, dozen special cases that I have mentioned, and with respect to tariff protection.

In the 1930s this went very much further. In the 1930s, first the impact of the great depression and during recovery considerations of rearmament impelled the British Govern-

ment to take much more active part and to encourage industry to organize as best it could.

3208 The so-called May Committee report on the steel industry in 1932, I believe, advised very completely the rationalization. The tariff was enacted in 1932, in the spring of 1932. A flat rate of 10 per cent on everything, except raw materials and manufactures. On manufactures the flat rate was 20 per cent except for machinery, chemicals and other items considered important, on which the rate was 30 per cent on iron, and steel. The Ottawa agreements, followed this tariff legislation, giving the British Government, I mean, British industry, rights of considerable exclusiveness within the Empire.

The Import Duties Advisory Council was also set up in 1932, which was a committee to advise the Treasury on how to handle the tariff and pretty much how to act in trade negotiations, and its advice is, I believe, generally followed.

With respect to steel, the case is very famous and very well known: The Continental Steel Cartel was granted a quota of 600 odd thousand tons imports into England for the year 1934 and a smaller quota for 1935, and British steel makers were, I believe, given special tariff protection of 50 per cent in order to be able to rationalize without interference from the imports.

I have the steel reports here with me, if any more detail is needed, but I think that is sufficient.

3208a I think I ought to mention that the first international cartel in which the British Government participated or, which was sponsored by the British Government, rather, was the Stevenson rubber plan, which went into effect in 1922 and was a major innovation of the previous decade.

3209 During the 1930's these became quite numerous:

I mean, the tin cartel of 1931, the rubber cartel of, I think, 1933 or 1934, the tea cartel, the cocoa cartel—I mean, all of these were British-sponsored—and the interesting thing in that connection is, I mean, the British Government has been very strongly accused by liberals in England of being under the influence of the large corporations and moneyed interests.

There is a book by Mr. Simon Haxey, called "Tory M P", which describes, among other things, how 181 Conservative members of Parliament held 775 corporate directorships, and how Sir Patrick Hannon, the first vice-president, that is the executive head of the Federation of British In-

dustries, the industrial supercartel, if you will, is also a member of Parliament; and it pointed out that a number of Cabinet Ministers had a number of directorships in corporations, which they relinquished for the time of their tenure of office, and, of course, the book draws certain unflattering inferences with respect to the business influence on Government during the Conservative era of the 1930's.

Q. Are you familiar with the expression "terms of trade" as used by the British?—A. Yes.

Q. And what does that mean?—A. Well, "terms of trade" is a technical term in economics, and it means
3210 the relationship of import prices to export prices.

It has been always a matter of great concern in British discussions of British economic policy that the terms of trade should be as favorable as possible for England, that is to say, that imports should be bought at the lowest possible price, and exports should be sold at the highest possible price, so that the relationship of export prices to import prices should be as favorable to England as possible, and this has been a very strong motive in British Government action with respect to international trade.

The question of elasticity of demand comes in very strongly, namely, where demand is inelastic, prices can be raised very substantially without loss of volume; and in this connection it is also important, I think, that from the British point of view, rubber, and tea, and cocoa and other colonial raw materials, are, in substance, exports from England, because the costs of production are all paid in sterling or its equivalent in British colonial areas, and the proceeds are dollars or French francs, or marks, or whatever the case may be.

The climax to this industrial reorganization of England was the Dusseldorf conference in March—on March 15th and 16th, I think—1939, which is described in the Kilgore Report, Part II, in which the delegations of British and German industrialists, specifically, I think, of the
3211 Federation of British Industries and its German equivalent, Reichsgruppe Industrie, held a meeting in which an agreement was drawn up, but which never became operative because of the outbreak of the war, purporting to divide up the world industrial markets between English and German interests and to the exclusion of third countries—of competition from third countries.

Q. Have you examined the current literature with reference to the organization of British economy with a view

to forming any opinion as to what the attitude of the British is going to be in this respect after the war?—A. Well, that, of course, to some extent is prophecy, but the current English literature suggests that they mean to have a very strong, centrally organized economy. I think that the Committee for the Study of the Organization of Peace here in New York put out a pamphlet in December, 1943, summarizing published plans of British industrialists, every one of which envisage the creation of industry-wide organizations for each industry with coordinated production and selling.

The British delegation at the International Chamber of Commerce meeting at Rye, New York, last November, and also took quite a strong stand in this respect, which was reported in the papers.

3212 The Attorney General, Mr. Biddle, made a speech in Boston, I think, last Wednesday, where he stated that he expected all British industry would be cartelized after the war. I do not have the original text of his speech. I have written for it, but I haven't got it yet. I have only the newspaper report, but that was the substance of it.

And the white papers on post-war employment and land utilization also very strongly indicate that the British Government is going to play a very active part in the organization of post-war industry.

Mr. Geoffrey Crowther the editor of the Economist wrote an article in the Yale Review for I think this last issue, the winter of 1945, about British industrial organization after the war in which he apparently describes but also advocates a system of government control, cartelization in part and in part actual government operation of large industries. I have the documents here. I don't know how far you want me to go.

3213 Q. I don't think there is any need to go into that any further. I want to ask you the same questions about the organization of industry in Germany and I would like to have you take us through the period before 1914 just as quickly as you think you can without leaving out any important matters.—A. Well, before 1914, in Germany, cartelization was fairly widespread. The official source of information is the report of the Cartel Commission published in 1905, of which I unfortunately do not have a copy, but which is fully described by authors on German cartelizations, including TNEC Monograph 40, and Mr. Robert Liefmann's subsequent book on "Cartels, Combines and

Trusts," which was published in New York in 1932, of which I have a copy here. That book also offers relevant documents after 1923 which we will refer to later.

The substance of it is that cartelization first began in Germany in the 1860s or 1870, had a slow start, but flourished from 1890 on, and was accepted as a form of organization of industry. This government inquiry of 1905, I think, lists 385 cartels which they had investigated at that time. The units in German industry were much larger than in Britain, in the British industry. From the start, you see, the development of German industry coincides in point of time with the development of American industry. Modern American industry began with the Civil War. Modern German industry began with the wars against Denmark, Austria and France in 1870-1871. The development was very rapid, in fact the fastest, except for the United States, and the size of the enterprises was also the largest, except for the United States.

There is an excellent American publication, as a matter of fact, on monopolistic combinations in the German coal industry by Mr. Francis Walker, which was published by the American Economic Association in 1904. And I think the United States Industrial Commission in 1901, a study by Mr. Jenks, on "Combinations in European Industry." I don't have the Jenks, but I have the Walker here.

Anyway, German industry was fairly extensively cartelized by 1940, and the Government on the whole didn't look upon it with disfavor because the Germans were a nation of technicians and technical efficiency was obviously permitted by these large undertakings, coordinated production and so forth. The political leaders of the Reich thought that such an organized growth was preferable to haphazard fluctuation even from the view of military economy.

During the war, again I think we can go over that quite fast because the situation has changed in Germany so much, during the war they had the same.

The COURT. You mean the first chapter, the present war?

The WITNESS. No, I am talking about 1914 to 1919.

A (Continuing) The same thing happened in Germany that happened in England, only very much more so, namely, trade associations were formed right and left. Walter Rathenau was Minister of Economics or possibly the title was Minister of Economic Warfare, but I think

it was Minister of Economics, he I think in 1916 drew very extensive plans for the wartime realization of German industrial resources, and, as a matter of fact, it was in 1916 that a very large part of the German chemical industry was merged in a so-called community of interest which is now known as I.G. Farbenindustrie.

When the war was over and the Socialists came into power, Von Moehllendorf, who was I think Under-Secretary of State in this Ministry of Economics, although I am not quite certain, anyway he was one of the Under-Secretaries of State, he proposed a very extensive plan for the trustification and State control of German industry. This was opposed, I believe, by industrial interests, and came to nothing. This was in 1919. And then

3216 came an extremely disorganized period in German industry, where all the old cartels broke up under the strain of inflation. There was no sensible way of allocating markets, fixing prices or anything under the conditions that prevailed in Germany between 1919 and 1923. On the other hand, enormous mergers took place in a very senseless way because everybody was going into real assets, fixed assets, and particularly haphazard corporate giants were created which after 1923 had to be broken up and reorganized.

I think that is really all that need be said about it.

Q. What was the difference in the attitude of Germans toward cartels during the liberal regulation of cartels between 1923 and 1933? That was a very different form of attitude than the attitude that developed later, was it not?—A. Oh, yes. In 1923 the first cartel ordinance was published, in 1923, which regulated cartels. The text is reprinted in Liefmann's book which was published here in New York in 1932; so it is easily available. It was a system of Government supervision of cartels, but otherwise it did not hamper their freedom of movement and freedom of organization. And at that time I believe it was semi-officially estimated that there were something like 2500 cartels in German industry. And under this system cartelization of course spread, I mean this was very

favorable climate for cartelization and it spread
3217 fairly extensively.

From 1926 to 1930 the German Government held a major inquiry which had a very peculiar name, which was called the Enquete, which means inquiry, into German industry. It published findings of voluminous proportions which are briefly summarized in TNEC Monograph No. 40,

which I mentioned several times. And also I think in the TNEC hearings, although I don't remember now whether it was an exhibit there or not.

Q. I was going to ask you, and I have gotten to a point where it would be appropriate to do so, about the French attitude during this same period.—A. Well, in France, the old code was very strict in prohibiting all forms of combination and agreement, both of employers and of employees, and the first breach in that was some time in the Nineteenth Century, I think in 1886, when trade unions were recognized. But while the French legal situation remained very obscure with respect to cartelization, the idea itself spread very strongly and in the Twenties the French ideas of cartelization played a very important part in Europe. In 1924, Mr. Jouhaux, a French Socialist, who was one of the leaders of the French Socialists—he was the head of the C.G.T., which was the French labor organization—proposed an international conference for the reorganization of European industry. Mr. Louis Loucheur at the League of Nations meeting in September 1925, made this an official proposal, and Mr. Loucheur was a representative of French heavy industry, and as a result a world economic conference was called by the League of Nations in 1927.

Of course publications of this conference, the publications prepared before the conference and then at the request of the conference afterwards, are a very important source of material with respect to the degree of cartelization and what was expected of it at that time. And the expectation was that it would help to cure the economic ills of Europe created by the World War.

Now this might seem a strange approach to us, but the fact is that both the French and the Germans at that time felt that that was a way to pacify Europe. The argument ran something like this: that the war created a number of new frontiers and industries fell within these new frontiers in a completely haphazard, unplanned way; none of them were fitted for the country in whose borders they found themselves. The only way to break through these walls of nationalism was to form international industrial agreements. And, as a matter of fact, Mr. Briand in his plan for a united Europe and the plans he worked out with Mr. Stresemann in the late Twenties were all to some extent inspired by these conceptions which were also at the center of the 1927 conference.

A very famous example was the steel cartel and the steel agreement between France and Germany which antedated even the World Economic Conference. Prior to 1918 Lorraine shipped iron ore downstream through the Ruhr, and the Ruhr shipped coal upstream to the Lorraine, and that was a two-way traffic which was economically very sound because the same parties carried traffic both ways. And the very rapid development of Lorraine and the Ruhr industries was connected with this two-way traffic.

When Lorraine went back to France there was a frontier and the tariff wall that stopped this traffic, and as a result the French had too much iron ore and not enough coal, and the Germans had too much coal and not enough iron ore. And that was the economic foundation of the first French-German steel cartel after the war.

In the Hapsburg Empire this kind of case was quite typical. I mean, the industries of Bohemia were originally built up for a market of fifty million people and then they found themselves with an empire of thirteen million Czechoslovakians for their domestic market, and had to somehow find a way of making a living. Now, on the other hand, new competitors within the new frontiers of 1, naturally, everything to exclude the old, big competitors who now happened to have fallen on the other side 3220 of the frontier, and this led to some of the fantastic economic complications and uneconomical methods of production that were so characteristic of Europe during the '20s, even more so during the '30s.

And this, incidentally, was also a considerable incentive for German industry to seek cartel agreements in all directions towards Eastern Europe: Poland was a very thoroughly cartelized market, Czechoslovakia was a very thoroughly cartelized market, so was Austria. The Czechoslovakia cartel law of 1933 required a cartel register, so we know exactly how many cartels they had, and how extensive they were. And the same is true of Poland, although I don't remember now when the Polish cartel law dates from—I think it also dates from around 1932. I think Reichert's books on cartels, a German book published in 1935—it is called the cartel law—that I referred to—or something like that—also gives the dates.

Q. This period prior to 1933 was a period characterized to a large extent by voluntary combination and cartelization?—A. Certainly. This was wholly a private economy; the Republic was under the control first of the Socialist

party and then the coalition of Liberal parties under Mr. Stresemann until 1930, and then Chancellor Brüning came into control in 1930, and they had no organization principles with respect to economy. I mean, they were ideological Liberals and to the left of the Liberal.

3221 Q. Have you reached a point where you can describe for us what happened after 1933?—A. Yes. I just want to mention that in 1930 the cartel ordinance was revised, the 1923 cartel ordinance was revised, in the light of the results of the Enquete. Well, when the Nazis came into power, which was at the end of January, 1933, the whole situation completely changed, because they had very positive ideas as to how they meant to run the state and the German economy, and they put that very speedily to effect.

The first thing they did was to proclaim a large make-work program, I mean, the first philosophy, at least as stated, the first philosophy of the large Government expenditures was essentially the idea with the WPA; you generate a large body of public works, and that creates re-employment.

Then in July, 1933, they published a decree authorizing the Government to compel cartelization in industries where they felt it desirable, and then very shortly afterwards they changed their base and said what they are interested in is not to create employment, but to create national defense. And from then on the whole economic direction of the Reich was subordinated to military requirements.

This was of course very expensive right from the start.

3222 In February, 1934, they published a decree, a law, rather, for the reorganization of the industrial economy in which they gave themselves very extensive powers, and they used those powers in a series of subsequent decrees putting the whole of the German industry into compulsory cartels. And this was the decree of November, 1934, amended in 1936. There was a super-cartel, the Reichsgruppe Industrie, and under it every industry was combined both horizontally and vertically; a regional organization was created in regional chambers of industry which covered the entire German economy, and the Government made no bones about it. They stated very openly that the purpose of this was to subordinate industrial production and the organization of industry to the political purposes of the Reich.

Q. Have you made a study of I. G. Farben and the com-

petitive situation in the German chemical industry?—A. To some extent, yes.

Q. Will you just describe that to us, please.—A. Well, I. G. Farben originated in cartels in the chemical industry, some of which go back to the turn of the century; several component companies had various syndicate arrangements from 1902 and 1903 on. Then the six largest chemical companies were merged in a community of interest in 1916 and the present enterprise was created in 1926, when one

of these six merged enterprises absorbed the others
3223 and rechristened itself the I. G. Farbenindustrie A.G.

This company had a capital stock of about 720,000,000 marks, plus some 250,000,000 marks of bonds. In other words, it was a billion mark corporation. I think it was the largest enterprise in Europe, except England. Imperial Chemicals is larger in terms of total assets. I mean, I think that as of the late 20's the total assets of Imperial Chemicals were about £100,000,000, that would be about \$500,000,000, and I. G. Farben would be about \$400,000,000. That is the order of magnitude of these two corporations. I do not have a reliable or accurate estimate of exactly how large a proportion of German chemical production was concentrated in the hands of I. G. Farben, but I believe that it was of the order of between a third and a half of total output and a considerably higher proportion of total export trade in chemicals.

Q. Have you any basis for an opinion with reference to the conditions that an outside chemical company would face in endeavoring to compete with the I.G.?—A. Well, my opinion is that it would be very difficult. First of all, the company was very large. In the second place, the company was a very efficient producer. The two greatest chemical inventions of this century are both associated

with I. G. Farben, namely, the development of
3224 synthetic nitrogen and the development of hydrogenation of coal. These are by a very wide margin the most spectacular developments, and both were completely I. G. Farben-developed. In other words, their technical excellence in the 20's is not subject to doubt, I think. Moreover, the general business management of I. G. Farben I understood was always extremely efficient. They had a very complete sales organization. They controlled the German market very completely. They had cartel agreements with everybody within Germany. They had a number of agreements of course also with their foreign competitors. And, lastly, they were close to the Government.

The I. G. Farben, I understand, used to finance indirectly the Frankfurthe Zeitung, which was a liberal newspaper. It was the leading internationalist corporation in Germany during the 20's as opposed to the steel industry, which was the leading nationalist industry. They had very far flung international interests and they meant to protect them, and that always was a two-way street. One was that they reached out into international markets, protected their own domestic markets, and the other was that they were very close to the German Government, and, therefore, I imagine would have very substantial influence with the German Government with respect to policy as it affected chemical imports and trade in chemicals generally.

3225 The COURT. Taking the European or the Continental situation as a whole, over the period you have described, you moved from competition to combination and from combination to cartelization, and from cartelization on a voluntary basis to cartelization with the benign approval of the government, and from that to compulsory cartelization in many instances.

The WITNESS. Just about that. Or, rather, the adoption of cartelization as an instrument of national policy. I would say that was the—

The COURT. I am surprised you have not moved further eastward and pointed to the monolithic organization of industry in the U. S. S. R.

The WITNESS. Partly because I have not been asked the question.

The COURT. That is a very good reason.

Q. There is in evidence, Mr. DeVegh, a letter in which the I. G. Farben in 1933 expresses some concern about the possibilities of competition in Europe on the part of the du Pont Company. Have you any views as to why the I. G. should have or expresses such feeling?—A. Well, the imputation of motives is always a difficult matter, but I think we have several very tangible clues. One was that in 1933 the dollar was depreciating, while it was the official policy of the German Government to maintain
3226 the mark at parity. Now that meant that if ever at some future date German exchange control were abolished and German import controls were relaxed, which of course in 1933 were very strong, then the cost reductions due to dollar depreciation, which were cost reductions in terms of marks, mark equivalent, not actual reductions in dollar costs, might become great enough to make American costs competitive with German costs.

Then, as I said, it is my understanding that I.G., up to 1933 at least, was the leading internationalist combine in the German sphere of influence, although it was naturally very completely coordinated by the Nazi Government and used to the utmost for the furthering of their own purposes subsequently. And I should imagine that under such conditions they would feel that, as in 1933, there is nothing to fear because import controls alone make any import from the United States, competition from du Pont, nonsense, because they can always go to the Government and prove that chemical imports from the United States are superfluous, whether from an employment point of view or technological point of view or any other point of view, and the Government, which was very hard pressed for dollar exchange anyway, would certainly accept that reasoning. But if the management felt or hoped that eventually they would be rid of the Nazis and a freer regime set in, then the situation might be very different.

Q. You have mentioned the exchange problem. Do you consider that that affected trade between the United States and Germany and the United States and England in the 30s?—A. To a very considerable measure.

Q. Will you please give your opinion and your reasons for your opinion upon that, but first, if you will, discuss it in terms of the dollar shortage during that period.—A. Yes. Well, the best source as a matter of fact on the subject of the dollar shortage is a study put out by the Department of Commerce, Economic Series No. 23, by a Mr. Leary, which discusses the balance of payments of the United States over two decades. His essential argument, I mean of that pamphlet, is not really subject to controversy. I believe every author on the subject accepts it. As a matter of fact, some of my own papers and my book are very much along the same line. I just thought it would be preferable to refer to a Government publication rather than to my own personal opinions.

The argument in substance is this, that the imports of a nation will go up and down with its own national income because naturally the bigger the national expenditure the more will be spent on total consumption and more will be spent on imports; conversely, when national income and expenditures go down, imports go down.

3228 During the 20's the United States were very prosperous, imports into the United States were very high as compared to subsequent figures. Our imports

used to run into four billions a year, and subsequently they dropped as low as a million and a half, a billion and three-quarters at times. Secondly, during the 20's the United States was the principal source of international lending for the revival of world economy. This meant in reverse for the foreign countries that they had a very plentiful supply of dollars which they could spend right and left as they wanted, and which they did spend right and left.

The COURT. Mostly "left" as we now see it.

The WITNESS. Yes, your Honor.

A. (Continuing) Well now, in 1930 this golden era came to a very abrupt end. Foreign loans became completely unsalable in the United States. As a matter of fact, American lenders began to pull in their previously extended loans and at the same time the onset of the depression made our imports toboggan, and there was a very sharp reduction in imports.

The COURT. Simultaneously the Smoot-Hawley Tariff Act went into effect.

The WITNESS. And the Tariff Act clinched the deal.

A. (Continuing).

3229 So, in 1931 the foreign exchange situation in Europe became very critical and its essential manifestation was a desperate dollar shortage. They could not find enough dollars to pay for their imports from the United States and to pay the claims of American short-term creditors as they were maturing. As the result, there developed a run first on Austrian and then on German banks, and all banks in Germany were closed I think on July 13, 1931. And from then on a very strict regime of exchange control went into effect in Germany.

Then two months later, a little over two months later, September 21, 1931, Great Britain abandoned the gold standard, and while no exchange control was imposed the depreciation of the pound automatically made imports from the United States 33 per cent more expensive.

I think I had better follow through very briefly each country separately rather than jump from country to country if I may.

Q. I will be glad to have you do that. A. In Germany what happened was that the Government then decreed a base period of foreign exchange ration and the foreign exchange ration of each company was its foreign exchange supply for commercial imports from July 1, 1930 to June 30, 1931, which was already substantially depression level,

significantly below pre-depression, and there was a
3230 rigid control of exchange transactions imposed
which steadily grew in complexity.

Now for the Germans the depreciation of the pound was a very serious blow because that made exports to England very difficult and exports from England to third markets very attractive to the third markets as compared to German exports. So, in May 1932 they cut the basic quota in half. So, from then on the industrial enterprise was only entitled to 50 per cent of the foreign exchange it had during the base period 1930-1931. The Nazis stuck to this for a while, and then in February 1934, in several very rapid steps, reduced the basic quota from 50 per cent to 5 per cent and imposed a complete import prohibition without Government license on really everything of any industrial interest or importance, the purpose avowedly being to import only things that were necessary for national defense or, rather, for rearmament.

And from then on they were in constant hot water foreign exchangewise and progressively defaulted on more and more of their foreign obligations because they were inflating the domestic price structure, making German production more and more domestically centered and relatively high priced so that their imports were only—the exports were only competitive if they gave subsidies in many instances. Certainly, they were importing a
3231 vast amount of materials for ultimate war purposes.
That is really the whole story there.

In England the story is much more varied because the dollar shortage there only lasted until 1934, after the depreciation of the dollar when, paradoxically enough, our stabilization and our paying \$35 an ounce for gold bailed them out because, substantially, the British Empire substantially produces something between two-thirds and three-fourths of the world's yearly gold production, and there was a billion dollars a year in their laps. So, from 1934 to 1937 certainly there was no major dollar shortage in Great Britain.

In 1938 the dollar shortage began to appear again because of rearmament requirements and the renewed slump in the United States. In the fiscal year 1936-1937 the United States actually had a small import surplus on merchandise account because our national income recovered and that attracted imports, while our exports stayed down because of the exchange restrictions abroad that locked them out from foreign countries.

This situation lasted until the fall of 1937 when a new domestic slump in the United States lopped more than a billion dollars off our imports, so that in 1938 we had a billion-dollars export surplus exclusively because of the drop in imports, not because we boosted our exports. And the result of that was a renewed sterling crisis. Pound sterling dropped from \$5 to \$4.66. At the time of Munich and of course when this war broke out, and from Munich until the outbreak of the present war the pound sterling was again a weak currency where dollar payments were a problem where there were informal restrictions on capital movements and so forth. As soon as war broke out very complete exchange restrictions hit the sterling area. In the gold standard countries the same situation with respect to the dollar shortage existed until 1936 when they abandoned the gold standard and then there was a period of relief either in 1936 or 1937, and the renewal of the dollar shortage in 1938 due to rearmament abroad and to our lack of imports into the United States after the slump in the fall of 1937.

All countries, in substance, with the exception of 1936 and 1937, it was only a temporary alleviation, had their rigid exchange controls chiefly aimed, if I may generalize now, at an exclusion of imports and substantially the exclusion of imports from the United States. This is brought out very neatly by some charts that the Department of Commerce published which showed that the share of the United States in world trade dropped very much more than the share of other countries, clearly indicating that the dollar shortage was the real problem. But when countries like, oh, any country in the Balkans, or the Baltic countries or Poland or Czechoslovakia or any others imposed exchange controls their first consideration was that they did not have dollars, and their imports from the United States always dropped considerably more than their imports from Germany, England, and so forth.

Of course, with this regime of exchange control, exchange clearing arrangements also became very frequent. That meant that two countries, first sometimes two industries in two countries and then two countries as a whole will reach an agreement that all their mutual payments would be canalised through specialized accounts. The British had a large number of these agreements from 1933 on; the Germans of course excelled in them and had the largest number of them. The system there was, that

they first ran into, that by over-importing from a smaller country and then turning around to a smaller country and saying, "You have to buy from us what we want to sell you."

I think that in substance the main importance of these exchange restrictions is twofold. One, the exclusion of imports from the United States, and the other, that in order to operate such a system efficiently you have to cartelize your industries because you have to allocate imports.

3234 You are not allowed enough to satisfy each one. they have to be allocated, and the allocation has to be based on some kind of quota in the domestic market.

Q. In your opinion, would it have been feasible for an American company engaged in selling a chemical product, specifically a pigment for paint, to engage in exports to an appreciable extent to Germany or England during the period of the 30s?—A. Not to an appreciable extent. I should imagine that a can of paint can always be exported. I mean, trifling amounts. I think if more than trifling amounts were involved in something that is so patently domestic, consumer product, at least as long as it is aimed at the consumers' market and not to some war use, of which I have no knowledge, I think it would be quite out of the question.

Mr. WEBSTER. Your Honor, I am going to turn to another subject. Perhaps this would be a good time to take a recess.

The COURT. We will take a short recess.

(Short recess.)

Q. Mr. DeVegh, this case relates in part to the efforts of an American company to promote a relatively new product internationally. Now based on your survey of the cartel situation in England and on the Continent, and also the matter of exchange control that you have just described, how would you as an economist describe the

3235 competitive problems of such a company, that is, a company engaged in attempting to promote a relatively new chemical product, namely, titanium pigments for paint?—A. Well, I do not know anything about the titanium pigment industry specifically. Taking the situation more anonymously, as any new industrial product or any new patented product or something like that, I would say that the competitive condition during the 1920s would already have been a very considerable difficulty and during

the 30s, for all practical purposes, well, if not insurmountable from the outside, at least very close to it. And I think that they would have two very marked features, and one is that there exists a very high degree of imperfection of competition in manufacturing, and especially in the manufacturing of chemicals, and the other is that the behavior of foreign enterprises and foreign governments would be very strongly monopolistic or not competitive, according to our standards, and very strongly aimed at exclusion or at such unfair practices as to result in very much the same thing.

Q. I wish you would describe, if you will, each of those features and then point out its bearing on a company engaged in the sort of enterprise that I refer to, and I would like to have you describe those two phenomena rather briefly.—A. There is really a problem 3236 in describing it. One can visualize competition in industry as going all the way from an imaginary and impossible extreme of perfect competition to an equally imaginary and impossible extreme of perfect monopoly. Now perfect competition and perfect monopoly are very accurately described in any text book on economic principles, and the perfect competition of the economist has a large number of requirements beginning with perfect knowledge of the market, perfect independence of each buyer and seller, such a size distribution of buyers and sellers that not one of them can by his action influence the price,—in other words, for any one of them the price is given,—perfect homogeneity of product, so that the product of one seller can be substituted for that of the other, and perfect mobility of the factors of production. In other words, you can go into the market and come out of it at will.

Now, this is a theoretical abstraction which is a very necessary tool for economic analysis but which every economist realizes does not exist and is not even translated.

The COURT. As rare as a Euclidean triangle.

The WITNESS. Yes. If I only knew what the Euclidean triangle was I could say. I have been trapped, your Honor; I wish to withdraw my "Yes."

3237 Q. Well, go ahead.—A. Well, the point is that manufacturing invariably requires some plant investment and especially in chemicals a very considerable plant investment which in itself makes competition imperfect in

the terminology of the economist, meaning that the conditions of perfect competition do not exist. That does not mean that imperfect competition is less competition. It can be more competition. Just as a ride on a lame horse might be very much more painful than a ride on a very healthy horse. Both are horses.

In fact, I should imagine that the correct way to describe the imperfect competition of the economist is that that is free competition of the law. It implies nothing with respect to the behavior of the competitor in any way. The degree of imperfection of competition can be measured possibly by the number of sellers. I mean, an industry would be more—the competition in an industry would be more imperfect if there were a fewer number of sellers or if a larger percentage of the total industry were controlled by one seller or a small number of sellers. Competition would be more imperfect if the product differentiation between individual producers increased, so that Chesterfields would not be substituted for Lucky Strikes and vice versa.

But these degrees of imperfection are I do not think in any sense degrees, of themselves, degrees of competitiveness. They do have one very important effect, namely, that they make competition very much more dangerous than the competition of theoretically perfect conditions, because the price in perfect competition is the price needed to bring the highest cost seller still needed to satisfy the demand. Up to that point everybody's costs are taken care of. In imperfect competition there is absolutely no telling whose costs will be taken care of. And because of the capital investment necessary in most modern industries this has the important effect that after each upswing, after each period of expansion, whether restricted to the industry or universal in the economy, when they are making a down-swing there will be a vast amount of excess capacity in certain industries. That excess capacity has given prime costs and on top of that large overhead cost and depreciation. As long as the price stays above the prime costs it pays to keep the excess capacity running even at a loss. And of course it has been considered good industrial policy in the past at times and under conditions of depreciation to sell even below prime costs in order to keep the good will of the customer and keep the organization together, and similar points of view. This is a very major

competitive hazard and the hazard itself is perfectly
3239 objective. It does not of itself represent anything
with respect to the behavior of competitors, except
that a company independently wants to get as much of
the market as it competitively can. This represents a
very much greater hazard for something that is beginning
in the face of established businesses, that is to say, it is
a greater hazard for the small plant than it is for the
large plant. It is a greater hazard for the small plant
than it is for the large plant; although all such generaliza-
tions have their own imperfections, exceptions can be con-
strued to everything. But this is essentially true.

The other factor that has a great deal to do with
this aspect of the imperfection of competition is at the
monopoly end. It is the fact that in modern industrial
technology there are substitutes for almost anything.
I mean, the village hardware store is a monopolist for
a small segment of the market. The International Nickel
Company is a monopolist for a segment of its market
but it is not a perfect monopolist in any sense because
the moment you move a little further away from your
central monopoly area you run into the competition of
a substitute product or a substitute supplier, and the
range of modern industrial substitution especially in the
chemical field is extremely great. So that each product
within a very narrow range is monopolized. Then
3240 in a twilight zone it is a competitive product.

Then, beyond that zone it ceases to have economic
competitive value. For a specialized enterprise, for a
small enterprise there are difficulties in this fact of substi-
tution because, after all, the substitutes are owned by
somebody, and if the owner of the substitutes is large
and powerful and well diversified it can go very far in
endangering a new venture, and this endangering, still
at the present level of discussion, does not imply anything
unfair on the part of the large enterprise.

To make it quite concrete, a small factory if it can
hold its own with respect to prime costs or its cost of
production, including depreciation, has not yet solved
its competitive problem because the large enterprise may
have such a tremendous advantage by way of advertising,
nation-wide advertising, nation-wide sales organization or
a sales organization distributing a very large number of
products so that the incremental cost of selling the new
product is very small; whereas the new organization
would have to apply its entire sales overhead on its one

new product and it starts with a very substantial handicap.

3241. Then I think that the question of resistance to business fluctuation is very important. A new product, an untried product, is very much more vulnerable than a single product is much more vulnerable than a diversified business where various products can offset one another. The loss on one can be absorbed by the other, or absorbed in income tax, and even out fluctuation in earnings and so forth.

Then there is a second major aspect of this competitive problem and that is concerned now not with the theoretical qualities of imperfection and the hazards created for small companies by imperfection, but with the hazards created by the effect of what I might describe as monopolistic behavior, or behavior in that exclusion, which is an entirely different phenomenon, where the local or national interest uses methods aimed at preventing competition from materializing on the part of the new venture or new product.

Especially in the chemical field, it is notorious that national governments in Europe have considered the chemical industry a war essential industry and have taken steps to safeguard it, to build it up and to prevent it against outside competition so as to create the strongest possible industry, both in the case of England and in the case of Germany. I referred to the organization of a
3242 chemical industry here. Similar developments have taken place in a number of minor European countries.

Invariably the point of view is, since this is a strategic industry, the arts of the chemical industry should be stimulated, native chemical engineers should be encouraged, the industry should be made financially strong, independent from foreign competition, and whenever necessary, I believe, very far-reaching legislative enactments have served to exclude competitors from abroad.

Q. I think you have already touched on the effect of this combination movement abroad on new products. I just want to ask if there is anything that you have said with reference to the imperfections of competition and what you have called monopolistic practices, that is, restrictive practices in Continental countries or in Europe, whether or not there is any particular aspect of that that is important or emphasized in the case of a new development attempting to find a place for itself in a European or English market?—A. Well, I would say that the implication

for a new development was that either it came to terms with people within the ~~part~~, or else it would stay out. In other words, the alternative is to come to terms or not to trade.

Q. Getting down to a somewhat more precise application of this discussion and of your opinion, have you, 3243 first, an opinion or do you know how the various ways in which an American company, desiring to engage internationally in the promotion of a relatively new product, would go about doing that; and then, after you have stated that, I wish you would give your opinion, if you have one, as to the advantages and disadvantages of each of those means of access to foreign trade in that form?—A. Well, the various obvious ones are exports, or wholly owned subsidiaries, or partly owned foreign subsidiaries, or foreign licensees. I cannot think of any other way of doing it. Each one of these has, so to say, its own anatomy, if you will.

The export trade, that is to say, the promotion of a new product in foreign markets by exports from the United States, has been, before the first World War, the most frequent, and, of course, at that time our industrial technology was not as developed as it subsequently became, but nonetheless manufacturers were a steadily increasing proportion of the total exports from the United States. Yet even then they ran into all kinds of problems, and the realization that there existed very particular problems in the field of exports led to the Webb Act, which permitted a limited form of cartelization for an American corporation engaged in export trade.

The problems were envisaged, I believe, as essentially competitive problems, and the idea, as far as

3244 I can see, of permitting exporters to combine was to strengthen their bargaining position abroad by not having to compete against each other.

I believe that the Federal Trade Commission gave an opinion in its famous Silver letter, which is quoted in TNEC Monograph No. 6 in full, to the extent that these Webb associations can combine with foreign associations with respect to division of territory, I think, and that their effect on domestic price is all right, I mean, if their effect is to raise the domestic price, that is all right, so long as it is incidental to the main purpose, but, as I say, this is all in the Silver letter in TNEC Monograph No. 6. I think it is page 125 to page 127.

It is a very significant document from the viewpoint of

the approach and the problems that came up relatively early in the life of that piece of legislation.

Now, the problems that were foreseen and perhaps somewhat uncertainly grappled with in the Webb Act and by the Trade Commission in the early period became very marked subsequently and very marked, of course, with every development and specialization in industrial technology, the trouble being that the easiest way for anybody to get rid of competition is to go to its own national government and say that they want a protective
3245 tariff because that tariff will help employment, and that tariff will help the dollar shortage and so forth.

The result of this has been that the scope of American exports during the 1930s has been strikingly restricted and especially in industries, as I have had occasion to point out just before, that are infected with a genuine or a spurious national interest from the viewpoint of the foreign producers, the method of breaking into a market by exports from the United States is one that is steadily diminishing in importance. The exports move from the United States when they are liberally supported by credits or when we are a monopolist and the export cannot be obtained elsewhere—monopolist in a real economic sense. I mean, for instance, in machine tools in 1938; in 1938 and 1939 the world machine tool industry was operating at capacity. If the French or German or English or Japanese wanted additional machine tools for their own rearmament, they had to buy them from the United States, and so they came and bought from the United States. That is what I mean by being a monopolist seller in a given situation, you see. Then, of course, when they have to buy, they will have to buy, but when there are domestic substitutes, of course the question does not arise, and the tariff protection is
only the least of it.

3246 I mean, whenever they can tie up a small company or a new product in patent litigation, by developing a set of incomplete patents, and then carrying it through their local courts, obviously that is, for all practical purposes, another method of excluding a competitor or making life difficult for him.

—Therefore, the other alternatives have become rapidly more important during the past quarter of a century. Direct investment of American corporations abroad represents a very substantial capital investment and a very substantial source of income, and by direct investments are meant foreign subsidiaries of American corporations.

They are fully dealt with in the Department of Commerce publications on the balance of payments of the United States and foreign capital investment of the United States. There are a large number of them. In these cases, the major alternatives are wholly-owned subsidiaries abroad or partly owned subsidiaries.

3247 I also mentioned the third alternative, namely, the licensing of foreign producers, which is a somewhat enfeebled case of American interests in producing abroad. But, in some respects, belongs in this discussion.

The wholly-owned subsidiary is, in a sense, from the viewpoint of well-knit, well-organized industry, like many British industries, a Trojan horse, an enemy within the walls. Of course, very many American companies have wholly-owned subsidiaries abroad and many of them have had a very prosperous and successful existence, but wherever there is a domestic trade, that has preexisted, in other words, wherever the new product is a substitute product for something for which well entrenched interests are well equipped, the breaking in of the wholly-owned subsidiary is a very difficult thing. I mean, "Buy British" is going to be a very much louder cry against a product that is produced by that American factory, that factory that is wholly-owned by an American parent company, when there is already an entrenched industry on which this new American-owned factory is trying to, if I may say, "muscle" in. They view it as an unfair poaching on their preserves.

The method that has been very frequently employed by—I mean, a number of methods have been employed to get around these double difficulties of being able to

export at will and having difficulties in running
3248 a 100 per cent owned foreign subsidiary and pretending that it is a foreign company, I mean, domestic in the foreign country, one of which was partial manufacture of export products abroad, which eventually developed into full manufacture of the export abroad and ultimately develops into the sale of a part of the foreign company, foreign subsidiary, to local interests.

The increasingly preferred case is that of American companies forming subsidiaries abroad and taking in local interests so that the foreignness of the enterprise is diluted, so it appears in the foreign market represented by domestic interests strong enough to protect the venture against other domestic interests in the foreign country that are hostile to it.

The cases of this are really extremely numerous and are rather increasingly so, even in countries like Latin America, where local interests are quite difficult to draw into an enterprise because of great differences in background and corporate experience.

These mixed ownership propositions are very popular in England, France, Germany and the Scandinavian countries, where technological knowledge is very similar. And vice versa, I mean, take the cases of mixed ownership, such as the Shell Union, which is partly owned by Dutch interests, and I don't know whether the British still
3249 have an interest in American Viscose, which they had, and S-K-F is largely, but not entirely, foreign-owned; there are a number of instances in this country where the mixed form exists.

Thirdly, there is the alternative of the licensing of wholly-foreign-owned manufacture.

Q. And the alternative, of course, is not doing anything at all?—A. Well, that definitely is implied in what I said, unless you have a friend in court as it were.

Q. I think now that we have got near the end of this if your Honor will permit me to ask you a guess question, namely, have you any guess as to what will be advisable in the case of an American company of the sort I have described to you in the future, after the war?—A. I think that from the viewpoint of the economic situation abroad and the institutional organization abroad, the answer is implied in what I said, in other words, you either produce in alliance with native interests in the foreign countries involved or else you do not get a share of the market.

The Court. I was rather impressed by the extremely high degree of correlation between the increasing number of economists and the increasing barriers to foreign trade. I don't know whether it is purely accidental, but the graph shows a very strong degree of correlation.

You may examine, Mr. Dixon.

3250 Mr. Dixon. No questions.

(Witness excused.)

3252 Mr. Whitney. I think Mr. Dixon has a stipulation before we proceed.

Mr. Dixon. May it please the Court, we wish to read into the record the following stipulation entered into between the parties to the proceeding as follows:

(Stipulation as corrected.)

Stipulation as to certain facts

It is hereby stipulated between the parties to this action, by their respective attorneys:

(1) That an appropriate official of du Pont, if called by the plaintiff, would testify that du Pont sold 124 tons of pure TiO_2 to Virginia Chemical during the period from August 5, 1937 to December 1, 1944.

(2) That an appropriate official of National Lead, if called by the plaintiff, would testify that National Lead shipped 100 tons of TiO_2 to Chemical & Pigments Company, St. Helena, Maryland, in 1939; that 25 tons of TiO_2 were shipped to Chemical & Pigments Company, St. Helena, Maryland, in 1940; that 70 tons of TiO_2 were shipped to Chemical & Pigments Company, Collinsville, Illinois, in 1940; and that 80 tons of TiO_2 were billed to The Glidden Company, Cleveland, Ohio, and shipped to Chemical & Pigments Company, St. Helena, Maryland, in 1943. He would further testify that The Glidden Company sells the pigments of Zirconium, using Chemical & Pigments Company, a subsidiary of Glidden, as the selling agent.

3253 (3) That an appropriate official of du Pont, if called by the plaintiff, would testify that du Pont sold to Zirconium and/or its affiliate The Glidden Company, the following specified tonnages of pure TiO_2 for the years indicated:

Year:	Tonnage
1931	118
1932	440
1933	635
1934	306
1935	202
1936	62
1937	61
1938	84
1939	331
1940	452
1941	510
1942	1739
1943	953

(4) That an appropriate official of Virginia Chemical, if called by the plaintiffs, would testify (a) that Virginia Chemical produced only pure TiO_2 under its license from du Pont dated August 5, 1937 (Exhibit L); (b) that
 3254 Virginia Chemical produced during the period from August 4, 1937, to June 30, 1944, the following net tons of pure TiO_2 :

Year:	Tonnage
1937	300
1938	2896
1939	4014
1940	5024
1941	5499
1942	5755
1943	6437
1944 (six months)	3647
	<u>33,572</u>

and (c) that said tonnage was all of the pure TiO_2 produced by Virginia Chemical during said period and constituted the entire production of titanium pigments produced by Virginia Chemical during said period.

(5) That an appropriate official of Zirconium, if called by the plaintiff, would testify (a) that Zirconium produced only pure TiO_2 under either its license from du Pont dated January 1, 1935 (Exhibit I), or its license from National dated May 6, 1935 (Exhibits H, ~~VI~~-1, and H-2); (b) that Zirconium produced a total of 523,895 tons of pure TiO_2 from January 1, 1935 to May 6, 1935, and produced 33,662 tons of pure TiO_2 from May 6, 1935 to July 1, 1944; 3255 (c) that Zirconium produced during the period from January 1, 1935 to July 1, 1944, the following net tons of pure TiO_2 :

1935	2206
1936	3053
1937	3316
1938	4403
1939	5281
1940	4829
1941	6568
1942	1796*
1943	236*
1944 (six months)	1974

33,662

* No production from October 1, 1942 to September 30, 1943, inclusive.

and (d) that said tonnages were all of the pure TiO_2 produced by Zirconium during said periods and constituted the entire production of titanium pigments by Zirconium during said periods.

(6) That du Pont's response to Paragraph 17 of the subpoena served on it by the plaintiff on October 30, 1944 is that it has no corporate records showing that either du Pont or any of its controlled subsidiaries filed any suit

alleging infringement of any titanium pigment patents of du Pont or of any such subsidiaries.

(7) That National Lead's response to Paragraph 17 of the subpoena served on it by the plaintiff on October 30, 1944, is that it has no corporate records showing that either National or any of its subsidiaries filed any suit alleging infringement of any, titanium pigment patents of National or of any such subsidiaries.

(8) That Titan Co., Inc.'s response to Paragraph 17 of the subpoena served on it by the Government on October 30, 1944, is that it has no corporate records showing that Titan Co., Inc. filed any suit alleging infringement of any of its titanium pigment patents.

(9) That du Pont's response to that portion of Paragraph 19 of the subpoena served on it by the plaintiff on October 30, 1944, calling for "the original records or books . . . showing the manner and method of arriving at" its price lists is that it has no such corporate records.

(10) That National Lead's response to that portion of Paragraph 19 of the subpoena served on it by the plaintiff on October 30, 1944, calling for the "original records or books . . . showing the manner and method of arriving at" its price lists is that it has no such corporate records.

(11) That an appropriate official of du Pont, if called by the plaintiff, would testify that the entire stock interest of Commercial Solvents in Krebs was purchased by du Pont on December 31, 1934, and that from 3257 and after said date until dissolved, Krebs was a wholly-owned subsidiary of du Pont.

(12) That an appropriate official of Titan Co., Inc. if called by the plaintiff, would testify that Titan Co., Inc. never granted a sublicense pursuant to the licenses received by it from du Pont under the license agreements dated July 27, 1937, June 20, 1938, April 21, 1939, May 10, 1940 and June 23, 1941, respectively (Plaintiff's Exhibits M, N, Q, R and S), on a cash royalty basis and therefore never paid to du Pont any cash royalties under said license agreements.

(13) Plaintiff's Exhibit 42 (page 209 of the transcript herein to the contrary notwithstanding) should not be deemed in any way to indicate royalties paid by du Pont (since there were none) under the du Pont-Titan Co., Inc. license agreements dated July 27, 1937, June 20, 1938,

April 21, 1939, May 10, 1940 and June 23, 1941, respectively (Plaintiff's Exhibits M, N, Q, R and S). Said Exhibit 42 refers solely to royalty payments made under the agreement of January 1, 1933, between Titanium Pigments and Krebs (Plaintiff's Exhibit E).

(14) That National Lead does not sell any titanium pigments which are commercially equivalent to the following titanium pigments which are, or have been, sold by du Pont:

TiPure LG.
3258. TiPure WR.
TiPure SI.

TiPure 33.
TiPure R 300.
TiPure R 510.
TiPure R 610.
TiBar O.
TiBar HHK.
TiCal R 25.
TiCal R 30.
TiCal R 31.
TiCal R 35.
TiCal HO-NS.
TiTint LG.
TiTint DG.
TiTint LB.
Titone L.
Titone 178.
TiTone J.
TiTone P.
TiTone NR.

(15) That du Pont does not sell any titanium pigments which are commercially equivalent to the following titanium pigments which are, or have been, sold by National Lead:

3259 Titanox L (Lead Titanate).
Titanox A (Phthalate Treated).
Titanox A 24-NO.

(16) That an appropriate official of du Pont, if called by the plaintiff, would testify that the price lists contained in Plaintiff's Exhibit 42 are accurate; that the prices and terms of sale indicated on such price lists are the actual prices and terms of sale established by du Pont and were in effect from the effective dates indicated on such price lists until the effective date of the next succeeding price list; that such price lists include all of the titanium pig-

ments sold by du Pont during the period when such price lists were in effect; and that such price lists and the prices therein contained were announced on some occasions prior to their effective date and on other occasions subsequent to their effective date and not necessarily concurrently with price announcements made by National Lead.

(17) That an appropriate official of National Lead, if called by the plaintiff, would testify that the price lists contained in Plaintiff's Exhibit 24 are accurate; that the prices and terms of sale indicated on such price lists are the actual prices and terms of sale established by National

Lead and were in effect from the effective dates indicated on such price lists until the effective date of the next succeeding price list; that such price lists include all of the titanium pigments sold by National Lead during the period when such price lists were in effect; and that such price lists and the prices therein contained were announced on some occasions prior to their effective date and on other occasions subsequent to their effective date and not necessarily concurrently with price announcements made by du Pont.

(18) That an appropriate official of Zirconium, if called by the plaintiff, would testify that neither National Lead nor any of its subsidiaries received any royalties from Zirconium under the license dated May 6, 1935, granted to Zirconium by Titanium Pigments.

(19) That an appropriate official of National Lead, if called by the plaintiff, would testify that the files of National Lead contain a draft of Plaintiff's Exhibit G on page 1 of which appears the following handwritten notation: "Left by Dr. Jebson July-1933-FMC-WCB".

(19a) That an appropriate official of the defendant du Pont, if called by the plaintiff, would testify that du Pont received no royalties from the National Lead Company or Titan Company, Inc. for licenses granted Titan Company, Inc. under plaintiff's exhibits M, N, Q, R and S, respectively, and that the du Pont Company paid no royalties to the National Lead Company or Titan Company, Inc. for licenses granted the du Pont Company by Titan Company, Inc. under plaintiff's exhibits Q, R and S, respectively.

That an appropriate official of the National Lead Company and Titan Company, Inc., if called by the plaintiff, would testify that neither of said companies paid any royalties to the du Pont Company for any licenses granted Titan Company, Inc. by the du Pont Company under

exhibits M, N, Q, R and S, respectively, and that neither of said companies received any royalties from the du Pont Company for any licenses granted the du Pont Company by Titan Company, Inc. under plaintiff's exhibits Q, R and S, respectively.

(20) This stipulation is made for the purpose of saving the time of the Court and counsel on the trial of this case and it may be set aside or modified by agreement or by direction of the Court in the event that such action may be deemed necessary or desirable in the interest of justice.

(21) The matters agreed to herein are for purposes of this action only.

3343 JOHN F. DALEY, called as a witness on behalf of defendant E. I. du Pont de Nemours & Company, Inc., being first duly sworn, testified as follows:

Direct examination by Mr. GESELL:

Q. Mr. Daley, you are employed by the du Pont Company, are you not?—A. That is right, sir.

Q. In what capacity?—A. General manager of the pigments department.

Q. How long have you been employed by the du Pont Company?—A. Thirty years.

Q. Will you state briefly what positions you have held in the company during the last thirty years?—A. Well, I started in 1915 in smokeless powder production work; went from there, after the war, into the chemical part of the business, stayed in production work, manufacturing, in charge of various processes, aluminum sulfate, paint and varnish, and then into pigments, going into the pigment department in about 1925. I was plant manager for the pigment department at their Newark plant for some time. I became production manager—

Q. When did you become production manager?—A. About 1931 or 1932, and I stayed as production manager for a matter of close to ten years, and I was director of sales of the department.

Q. Now, you were production manager for ten years? 3344 —A. Yes.

Q. That brought you up to about 1942?—A. No. It was probably about eight years, because I was sent under sort of lend-lease arrangement to the explosives department to start up the first smokeless powder plant that the United States Government directed for this war out near Louisville, Kentucky.

Q. During what time were you on that assignment?—A. Well, that was from November, 1940, until June, 1942.

Q. During that period you were technically production manager but on an assignment to an explosives plant job, is that right?—A. That is right.

Q. What happened in 1942?—A. I came back and was assigned to the job as director of sales, and I stayed there for four months.

Q. Of the pigments department?—A. Of the pigments department.

Q. At the end of that four months what did you do?—A. Well, the War Department of the United States Government asked for my services as—well, it was deputy field director of ammunition plants for the Ordnance Department of the Government, and I worked with them in a sort of supervisory capacity over production of all the ammunition for the War Department.

Q. Until when?—A. Until June of 1944.

3345 Q. You returned to the du Pont Company then?—

A. Yes.

Q. In what capacity?—A. Came back as sales director.

Q. How long were you sales director?—A. Probably about six weeks, because we had some illness in our higher management and I became an acting assistant general manager for about a month or so.

Q. That would be about when?—A. July of 1944.

Q. When were you made general manager?—A. September or October; probably October of 1944.

Q. And you have been general manager since that time?

—A. Yes, sir.

Q. When did Mr. Rupprecht die?—A. September.

Q. 1944?—A. Yes.

Q. Now the pigments department, as I understand it, is one of a number of departments in the du Pont Company, is that right?—A. That is correct.

Q. How many are there?—A. There are ten major or manufacturing departments in the company.

Q. And then certain service departments?—A. There are probably another ten service departments, engineering, legal, publicity or public relations, and various others of that kind.

Q. What is the scope of the activities of the pigments department?—A. The pigments department has full jurisdiction over any matters pertaining to pigments as

3346 manufactured or sold within the du Pont Company.

Q. What are the principal products that the pig-

ments department handles?—A. Your titanium products, lithopone and dry colors are the three major divisions of the pigments department.

Q. And there are certain other pigments that you sell?—

A. No. Well, we re-sell zinc oxide and a few items of that kind. They are more or less minor.

Q. How is the department organized internally? You are the general manager; and how many employees do you have?—A. Probably 1200 employees in the department, as a total.

The COURT. That includes manufacturing personnel?

The WITNESS. Yes, sir. We have four plants, and that includes the people at the four plants and in our main office.

Q. How many of those are engaged in the sale of titanium pigments?—A. In the sale?

Q. Well, in the titanium pigments operations.—A. About 700.

Q. And how many plants does the du Pont Company operate for the manufacture of titanium pigments?—A. Two.

Q. Where are they located?—A. Baltimore, Maryland, and Edge Moor, Delaware.

Q. And when were they built initially?—A. Well, 3347, the Baltimore plant was acquired from the Commercial Pigments Corporation in 1931.

Q. Since that date it has been expanded, has it not?—A. Yes, sir.

Q. When was the other plant built?—A. The other plant was built, I think, in 1935. That was its initial operation.

Q. Approximately how many customers does the pigments department have for titanium pigment?—A. I had that figure checked up by the Trade Analysis Division. In 1944 we sold to one thousand separate customers.

Q. And approximately how many different titanium pigment products does the division sell?—A. Roughly 40, currently active ones that is.

Q. As general manager to whom are you responsible in the du Pont Committee?—A. The executive committee of the company.

Q. Is that a committee made up of certain directors of du Pont Company?—A. No. That is a committee made up of eight vice-presidents of the du Pont Company.

Q. And in what respect are you responsible to that committee?—A. Well, the regulations of the company require that certain matters, prescribed items, must be referred

to that committee for any kind of a definite or final decision. That would include requests for new
3348 construction in excess of a certain amount of money which must be submitted to them; any matters involving patents or licenses must be submitted to them through the legal department or the committee on patents. I could not think of them all offhand, but there are other matters of broad company policy which might have some effect on another department of the company that you would normally recognize as a matter you should clear with them before making any commitment for the company.

Q. What, if any, commitments and agreements made by your department must be submitted to that committee?—

A. Any purchase contract, for instance, in excess of a given amount, or covering more than a certain period of time, and likewise with a sales contract of similar specified values or duration; commitments as to patents or patent licenses.

Q. Commitments as to technical information?—A. Yes, any commitment which would involve giving away something which you might regard as the property of the company, such as would be the case with technical information.

Q. How often does the committee meet?—A. The executive committee meets regularly every Wednesday.

Q. Are the reports made to the committee in writing or by personal presentation?—A. I think invariably everything taken up with the executive committee is in
3349 writing. That is a requirement.

Q. Do you ever appear before the executive committee in your capacity as general manager?—A. Oh, yes.

Q. In what connection would that be?—A. Well, in addition to those other matters that must be referred you must submit a monthly report to the executive committee of the progress in your department, the performance for the month, and once every four weeks, or once every month you must go up and discuss that particular report, in addition to going up on any other submission which you have filed with them with request for authorization for any discussion they might want to have on it before they pass on it.

Q. In other words, you make a written submission on one of the matters that comes within the scope of the work as you have described, and, if they want to talk to you about it, they call you up?—A. That is right.

Q. How many members are there of this committee?—
A. Eight.

Q. And it is responsible, is it not, to the board of directors of the company?—A. Yes.

Q. Now I believe you said that you had approximately a thousand customers, is that correct?—A. That is right.

Q. What type of person are those customers?—A. Well, they are largely in the major fields which we sell to; that is paint, paper, printing inks, floor covering, rubber—
3350 ber—they are probably the five largest fields—welding rods.

Q. They are all manufacturers, are they not?—A. That is right.

Q. And they purchase titanium pigments for what purpose?—A. For further processing into the particular product which they, in turn, sell to direct consumers.

Q. You have no sale of titanium pigments, as such, to an ultimate consumer of those products other than these manufacturing customers?—A. I do not think so, no; none at all.

Q. Now will you indicate what sort of sales force you have, the type of men you employ as salesmen, what their training is, and generally what the field of their activity is.—A. Well, to start with, in the pigment business you have got to realize the consumers' problems in selling pigments. The pigment business is rather along the lines of drug prescription business. That is what it currently has developed into, at any rate. Let us take, for instance, our major outlet, which is the paint industry. There are probably 12 to 15 hundred paint manufacturers in the United States. They represent every kind of an extreme with respect to size of the outfit, the size of the company, the type of equipment which they use, the different paint consuming fields which they in turn cater to or sell to, the type and extent of the technical organization which
3351 they have within their own organization, the type of formulations which they employ. Paint manufacturing is something like baking a cake. If you ask ten women to bake a cake they will ultimately bake ten cakes and you might like the chocolate, but they are all good cakes, but they are not made the same way. Neither do paint manufacturers make a paint for outside house paint all the same way, and all these conditions go in there. To meet these conditions that exist in these paint manufacturing establishments, you have got to have a techni-

cally trained man to sell your pigment, because he must appreciate the differences in the problems with the separate paint manufacturers. The type of paint generally referred to as a mountain district type of paint is different from the paint made in Philadelphia or Boston, generally speaking, or in the Middle West. The paint you have made for use in Florida or in your southern seaboard states is quite different, or should be, than the paint made for consumption in Illinois or Indiana.

The paint manufacturers will use stone mills, pebble mills, or roller mills, just depending on what the particular man elected to put in. Now any one pigment ground in the separate types of mills will give different results and may give different results as to gloss, as to fineness, which is your level, your smoothness of your film. There the difference is created by the conditions within
2352 the paint plant. You have to know that and to know what that particular paint manufacturer wants and the type of trade he is trying to sell to, whether it is a refrigerator manufacturer who wants a blue-whiteness, and the highest degree of gloss and the greatest degree of smoothness. He is willing to sacrifice some other property if he gets them. Now, your type of salesman must go in there if he can and find out what type of customer the paint manufacturer is that his product is for; what properties he emphasizes; what vehicles he uses with the pigments.

Q. What do you mean by "vehicles"?—A. I mean the oil, the liquid part of the paint. At one time you had linseed oil and China wood oil and the fish oil and turpentine, and that is all. But now you have a thousand separate vehicles available to the paint manufacturers and thus with your highly technical, big laboratory organization you must understand and know the different properties of the various vehicles and what they will do in the paints, and you must be up with that, and he must know it, so you have to have these technical salesmen to bring us in that kind of a story if we are going in to replace a product by a competitive titanium manufacturer.

Q. Now those differences in uses and the different problems you meet within the paint field, are they
3353 also met within the other fields to which you sell titanium pigments?—A. Yes, sir; they are identical problems; but the general number of problems and the degree of problems are present in rod manufacturers, or

paper or printing inks—the field really makes no difference.

Q. And I take it from what you said your salesmen are all technically trained so that they know how to advise the manufacturer to whom they are selling?—A. Well, we still have a number of salesmen, a few, I should say, of our older men, who are still with us who started years ago in selling of lithopone and took over part of the titanium sales trade. But any salesmen whom we have put out, and that would represent three-quarters of our sales force I would say, in the last fifteen years has been a technically trained man.

3354. Q. Well now, would you give us a typical instance of how a salesman might get and retain a particular titanium pigment account?

The COURT: What kind of fly and what kind of reel?

A. Well, normally the salesman has created some goodwill, or at least he is allowed in the door, he is allowed to talk, and he finally, we hope, reaches the point, or we will assume he reaches the point where he says, "Won't you try my stuff? It will give you some advantage over what you are using." He may have by that time through a number of visits been able to figure out that he is a man we would like to have, the type of trade he is selling; "We would like to have a better gloss"; and "I have something that will give you a better gloss. Will you try it out?"

And he may get the agreement of the paint manufacturer to try it out in competition with the material he is using. And, normally, that will be probably in a laboratory scale. And he will be told that it doesn't give any improvement in gloss and, therefore, they don't care to upset their factory conditions by trying it out on a larger scale. And he will then try to get the permission to bring a technical service man in with him, somebody who can get the detailed problems of this paint manufacturer

3355 and probably samples of his vehicles and his grinding conditions and take them back to our laboratory and work with the research crowd back there to find out why our material didn't give the expected improvement in gloss that we thought and hoped it would.

And he will go back and say, "Now we can prove it," and proves it again in the laboratory. And the man says, "All right, I will try that again." And he tries this out in the plant, and you may get an order. You try it out in the plant and it may or may not give you the degree

of improvement on this full plant scale equipment. If it does not, again you have to have your technical service men stay there in that paint manufacturer's plant to watch and figure out why it didn't give you this degree. Perhaps we can come back with enough information to again go to work in the laboratory and again correct the conditions—and I am covering a period normally of six or eight months—and finally you get in with a product which gives that man that advantage which is the important advantage to him in the type of trade which he serves.

Q. Does that involve presenting to the prospective customer technical comparisons of the properties of a du Pont titanium pigment and the competitive pigment of another manufacturer who is trying to sell the customer, or who has the account?—A. I don't quite get your question.

3356 Q. That is a little involved. Let me ask you this question.—A. These people depend on physical results. Now you necessarily have to discuss with that manufacturer, and depending again on the man's organization—you will find today that most of your paint plant superintendents are technically trained men, and then they also have the old super-doctors over in their laboratories; so your man necessarily has to discuss the technical side of the product. He would love to be given the opportunity if they will listen, he will fill out the order if they just listen. That is just making character and selling. And, normally, that is what happens. In addition to the physical tests to demonstrate the quality that you are after.

Q. Now in this process do you meet competition of National Lead?—A. Oh yes.

Q. How would you characterize that competition?—A. I would characterize it as plenty tough. They have got their good, big share of the business and very good products.

Q. Do you also meet any competition from Virginia Chemical and American Zirconium?—A. Yes, sir.

Q. Well now, how does evidence of this competition come to your attention?—A. It comes to our attention through our salesmen, the salesmen making regular calls; and according to our system, our so-called trade record system, a salesman sends in a written report on a
3357 prescribed form of each call, reporting whatever information he can get at that plant with respect to what the customer is now using, what particular grade

of competition he is using, and what efforts he made to sell, and what is to be done, what help he might get from the laboratory in helping him sell that particular account.

Q. Do your salesmen and technical people call upon and solicit the business of National Lead accounts?—A. Regularly.

Q. Do they call upon and solicit the business of the Virginia Chemical and Zirconium accounts?—A. Regularly.

Q. I believe you said you met competition of Virginia Chemical and American Zirconium.—A. Yes, sir.

Q. How would you characterize that competition?—A. How would I characterize the competition? I would characterize it like any other competition, that is tough; and they have the regular line of titanium products of good quality.

Q. Have you taken customers from time to time from National Lead?—A. Yes, sir.

Q. And from Virginia Chemical?—A. Yes, sir.

Q. And from American Zirconium?—A. Yes, sir.

Q. Have they taken customers from you?—A. They have, all of them.

Q. Have you any information as to the extent to which there is a shifting of customers as between you and
3358 National Lead?—A. Well, I had occasion to have that investigated, and our records—our trade record analysis shows that during the years 1935 to 1941, I believe that was the period covered, we lost—or we gained on the average 25 accounts per year and lost on the average of seven accounts per year.—And during that period our peak gain in any one year was 53 and our peak loss was 12.

Q. When you say gain and loss you refer to gain and loss from National Lead?—A. That is right.

Q. In selling titanium pigments do you meet the competition in the market of any other form of white pigments?—A. Well, we meet lithopone and white lead particularly. They are the two outstanding pigments.

Q. What companies are the principal manufacturers and sellers of lithopone?—A. New Jersey Zinc, Glidden, Sherwin-Williams, Eagle Picher. I believe they are the four.

Q. Are those large or small companies?—A. No; they are all large companies.

Q. Who are the principal sellers of white lead?—A. National Lead, Eagle Picher. They are the two that I can think of at the moment.

Q. Now when you say you meet competition of lithopone

and white lead, what do you mean by that?—A. You are selling in competition with those two pigments. Now you have got to have a product which to the customer represents better money value or better quality. And we compete with those other products on that basis. That is what I say.

Q. Do some of your customers use these various forms of white pigments in combination?—A. Oh, yes. The average outside house paint, for instance, will carry both titanium and lead and zinc oxide, for instance.

The COURT. All mixed in the one can?

The WITNESS. Yes, sir.

Q. Will you describe briefly the nature of the research organization which the pigment department of du Pont Company maintains in connection with titanium pigment activities?—A. Well, we have laboratories at our Baltimore and Edge Moor plants, to start with, and a central research work pigment laboratory at Newport, Delaware, which is detached from either of those two plants. Altogether, we have about 80 chemists doing research work on white pigments.

Q. Has the research work grown or diminished in the years since 1940?—A. Since 1940? I don't believe I could answer that accurately. I was out for such a period there that I don't know exactly what the comparison between 1940 and 1944 would be.

Q. Well, over the period— A. Our research expense has been on such an ascending line—I go back to a period of 15 years now, that I just can't visualize a reduction, except for the possible war effects of some sort.

Q. Will you describe briefly how you develop a new titanium pigment product?

The COURT. How you develop it?

A. How you do it or why you do it?

Q. Well, both. Perhaps, why you do it.—A. Well, we have those 80 research chemists to tell you the "how." But with our contact with the consuming industry, with 20 or 25 technically trained men, we are being constantly advised of the deficiencies of our pigment, both from the standpoint of the things that the consuming manufacturer, the paint or paper or what not man, would like himself to do as an improvement from time to time wherein we are deficient to competition.

Now we will take that sort of information and after proper discussion back and forth with our technical de-

partment, we will determine whether or not that is a fit subject for a research project, and if it is it will be fitted into the program and research work will be done on it. And, on top of that, we have a regular monthly meeting within the department of our New Products Committee which would include representatives from research, production, and sales, sifting over new possibilities, suggestions and so on which we encourage from various sources.

Q. I meant to ask you when you were discussing 3361 the organization of the pigments department whether or not it was the practice of the department for the various managers of different divisions and various key men to meet together frequently?—A. Yes; for several reasons. I mention one of them there, and in that group would be the management. Another one would be the monthly discussion of costs in which research and management and production and sales are all interested, naturally. Another one would be forecasting. We have—

Q. Forecasting sales?—A. We have to forecast our sales every three months and forecast it for the next twelve months, and at certain intervals to make a so-called more high spot, longer range forecast for three-year periods.

Q. Do you have such meetings to discuss production and planning problems?—A. Oh yes. Well, your sales forecast will necessarily lead into a consideration of more capacity, and then you plan as to how to arrive at that, what additional equipment you will have to put in, what improvements, process improvements your research organization in the interim have been considering, and when would be the proper time to turn it over to the engineering design division for detailed study, and so on.

Q. You have had those meetings of this type with your staff during the time you have been general manager and 3362 acting general manager, have you not?—A. Yes, sir.

Q. Did Mr. Rupprecht have such meetings while he was general manager?—A. Oh yes, regularly.

Q. You attended those meetings as production manager or as sales manager, whichever your position was?—A. That is right.

Q. Now, Mr. Daley, I want to direct your attention to a chart which has been marked for identification by the clerk as du Pont Exhibit for identification 94. Do you have a copy of that chart before you? It is entitled "Du Pont Productive Capacity and Sales of Pure TiO_2 , 1932-1944."—A. Yes, sir.

Q. Was that chart prepared under your direction and supervision?—A. Yes, sir.

Q. What was the source of the information contained on the chart?—A. The production capacity information is the official record of the pigments department as submitted by the production department as to their ability to produce, with such figure always being approved by the management. The sales information is the actual official records of the trade analysis section of the sales department.

Q. And this chart was prepared from that information?—A. Yes, sir.

Q. Now do I understand correctly that the horizontal line which appears on this chart in heavy black straight lines is plant capacity for pure TiO_2 ?—A. Yes, sir.

3363. That is the official rated capacity.

Q. What do you mean by "rated capacity"?—A. Well, that is regarded as the maximum amount that the plant can produce per month.

Q. And the jagged line shown in somewhat lighter width on the chart shows actual sales per month; is that correct?—A. Yes, sir.

Q. Now from time to time that jagged line rises above the horizontal production line and the area is shown in heavy black on the chart. Do you notice those situations?—A. Yes, sir.

Q. What do they represent?—A. The jagged line below the horizontal capacity line—

Q. I was talking about above, Mr. Daley; the blacked in portion.—A. The blacked in portion above represents periods where sales were in excess of current capacity.

Q. Where the jagged line is below, that represents, I take it, where sales were less than rated capacity?—A. That is right.

Q. The chart covers the period from 1932 to 1934, does it not?—A. Yes, sir.

Q. Why was it started in 1932?—A. That is when we started in the titanium dioxide business.

Q. Now examining the chart for the period 1932 to 1939, will you describe what it shows, as a trade production man?—A. It shows that we started in the business, and I said that is when we started in the business, that is when our first accurate sales records were available; it showed in our early stages in the business, in the year 1932, we were selling at below the then rated capacity of the plant and that in 1933 we went very sharply above our capacity with the requirement of expanding our

plant of the same year, and about the time we got that finished in 1934 we again oversold that. So we expanded again to a greater percentage all of our then existing capacity, and then a year after we completed that we again oversold it and made another small expansion, carrying us into 1935; and we immediately oversold that, and then made a very substantial expansion in the early part of 1936.

Q. That was soon exceeded, I gather, in 1937?—A. Again, in 1937 we exceeded that. And then took a period of 18 months or so of a depression period when we were undersold, but before the end of 1939 we were back up again in an oversold position and have practically stayed there ever since.

Q. When you say "depression period," you mean a period of general economic depression?—A. Yes, sir.

Q. Not just for du Pont's titanium pigment business?—

A. No. I might point out if I may, Mr. Gesell, that 3365 each one of these periods, each one of these expansions is a matter of something that happened, materializes let us say, about a year or more after you do your initial planning.

Q. So that during this period you discuss there was just a constant scramble as to whether sales would be ahead of capacity or capacity ahead of sales?—A. I was in production exclusively at the time and I remember that sales were ahead of capacity or were forecasting that they very soon would be, and I was scrambling for a period of eight solid years. That is my vivid recollection.

Q. Mr. Whitney points out the big dip that took place in 1942, below the line. Have you some explanation for that?—A. Well, in 1941 it appeared as if every buyer of pigments decided that he would never again be able to buy pigments—that was the general conception, because it was something akin to a buyers' panic, because in 1942 we had customers that didn't buy anything for eight or nine or ten months, they had way over-bought in 1941, and on top of that the paint business itself took a sharp curtailment in 1942. So you had the cumulative effect of over-buying and under-consumption which accounted for that dip in 1942.

Q. Well now, will you turn briefly to the chart which has been marked—

The COURT. Are you offering that in evidence?

3366 Mr. GESELL. I was going to identify them both and offer them both, your Honor.

Q. —du Pont's Exhibit 95 for identification. Do you have that in front of you, Mr. Daley?—A. Yes, sir.

Q. That is a similar chart. I want to reflect the relationship between capacity and actual sales of Ti-Bar and Ti-Cal in the period from 1935 to 1944.—A. Yes, sir.

The COURT. Those are the extender pigments?

The WITNESS. Yes, sir.

Q. Why does this chart start in 1935?—A. Well, that is when we first entered the extender titanium pigment field.

Q. It is made on exactly the same basis and from the sources as the previous chart?—A. That is right.

Q. Will you comment briefly on the relationship between actual sales and capacity for the period 1935 through 1939, as indicated on that chart?—A. Well, we started in this business in the middle of 1935 and were able to make some substantial initial sales during that first half-year. Before the end of the second year we hit a peak period of two or three months of approximately 95 per cent of our capacity. Then after dropping back down again for a period of nine months we did the same thing again in the following year, and then a second peak that same year which sold our entire capacity. Then by the end 3367 of the third year we were substantially oversold, requiring an expansion in the fourth year.

Q. Then, from then on through 1941 you were constantly in an expanding production situation, with sales in excess of capacity most of that time?—A. Yes, sir.

Q. Now referring to both charts, will you explain the situation briefly as it has existed since 1940? I refer particularly to the fact that there have been constant sales of TiO_2 in excess of capacity for that period, whereas there have been few sales in excess of capacity of the extender pigments could switch to lithopone, which in the and our inability to get a continued supply of ilmenite from our regular sources, we had to use other grades of ilmenite which curtailed our total production of TiO_2 and which at the same time greatly increased our production costs.

Now, we elected to take the TiO_2 and sell it as such rather than produce it and consume it in an extender—to make the extender pigment. Now, the consumers of extender pigments could switch to lithopone, which in the early part of the war was available, and could switch to white lead, which was available, more readily than they could switch—than could the consumer of titanium dioxide.

Q. So you automatically put a self-imposed ceiling on production of extender pigments?—A. That is right.

Q. As indicated by the dotted line which appears in the years 1941 to 1944 on the chart, identified as du Pont Exhibit 95 for identification?—A. That is right.

Q. And that permitted you to take care of these excess sales of TiO_2 in that period, as shown on Exhibit 94 for identification?—A. That is right.

Q. What is the rough ratio of the Ti-Bar used in the extender pigments to the ultimate product? Two to one? Three to one?—A. No. We consume—our rate of capacity let us say consumes 30 tons of TiO_2 in extender pigments, and 110 tons for sale as such.

Q. So that to take care of these sales of TiO_2 which extend above the production line on Exhibit 94 for identification, it was necessary to make a larger drop below the production line on Exhibit 95 for identification to account for that ratio?—A. Yes. 40 tons a day of extender pigments is 12 tons a day of TiO_2 . That shows your relationship for those differences.

Mr. GESELL. Now at this time, your Honor, I would like to offer these charts in evidence.

The Court. No objection. They will be received.

(Du Pont's Exhibits 94 and 95 for identification received in evidence.)

Q. Mr. Daley, I show you du Pont Exhibit 19, 3369 being a letter of Mr. Rupprecht to you under date of November 15, 1933, and ask you whether you carried out the instructions contained in that letter?—A. Yes, sir, we did.

Q. Will you state what the practice has been with respect to the subject matter?—A. The practice has been to show on the shipping container the patent numbers under which the product is manufactured.

Q. Now, Mr. Daley, some reference has been made in this case to the fact that the sales contracts used by the pigments department contain the words "for the buyer's own consumption." Do you recall that those words appear on the sales contract forms that are being used?—A. Yes, sir.

Q. Have you made any investigation to determine how long that phrase has been used on the sale contract forms employed by the titanium pigment division?—A. Yes, sir.

Q. What are the results of that investigation?—A. We found a contract which was signed in 1932 and the form

was printed in 1931, as shown by the printer's data on the form itself. That is the oldest one we could find; anything prior to that had been destroyed. We found that one.

Q. Is this the form I show you, the one that has been marked 96 for identification?—A. Yes, sir.

Q. Now state, if you know, what the practice is 3370 generally in the chemical business in respect of the utilization of this phrase on sales contracts of this type.—A. I would say that it is generally used throughout the chemical industry.

Q. Mr. Daley, what percentage of your business is sold on a requirement contract basis?—A. Well, in normal times—

Q. I mean, prior to the war.—A. That is what I mean. Better than 95 per cent of our business would be on a requirement contract basis.

Mr. GESSELL. I offer du Pont Exhibit 96 for identification. Not the printed matter on it, Mr. Dixon.

The COURT. It will be received. There is no objection. (Du Pont Exhibit 96 for identification received in evidence.)

Q. Mr. Daley, have you caused an inquiry to be made into the records of the du Pont Company, and specifically the pigments division department, to determine whether or not at any time the du Pont Company has refused to license anyone under any titanium pigment patent?—A. Yes, sir, I did.

Q. What is the result of that investigation?—A. We have never refused to so license anyone.

Q. What is your understanding at the present 3371 time of the obligations of the du Pont Company toward the National Lead Company?—A. I did not follow that.

Q. What is your understanding of the obligations of the du Pont Company towards the National Lead Company as to patents?—A. We have currently an agreement to notify the National Lead Company not later than six months after filing of any patent application and to license National Lead Company under any patent.

Q. Is that obligation contained in the agreement of 1933, as amended?—A. Yes, sir.

Q. Do you have any other understanding or agreement of any kind or form with the National Lead Company?—A. No, not at all.

Q. What are your obligations toward the National Lead

Company, if any, in respect of the exchange of technical information?—A. We have none.

Q. Have you any understanding or arrangement with that company in respect of plant visits, by them of your plants or you of their plants?—A. No, none at all.

Q. What are the obligations of the du Pont Company as you understand them toward the so-called foreign associates of National Lead Company as to patents?—A. We have no obligation to the foreign associates of the National Lead Company, other than as provided to give them refusal of any patents that we have when we care to offer.

3372 Q. You are referring again to the provision in the agreement of 1933, as amended?—A. Yes. That is what I thought you meant.

Q. What are your obligations toward the foreign associates of National Lead, if any, in respect of technical information?—A. None at all.

Q. What are the restrictions, if any, with respect to du Pont's right to sell titanium pigments outside the United States?—A. We have no restrictions other than might be covered in any patent matters.

Q. By that you mean you are free to sell in any part of the world?—A. Yes.

Q. What are the rights of others as far as between the du Pont Company and them as to selling in this country?

—A. I don't know of any restriction.

Q. Are there any obligations of any kind in respect of titanium pigments between the du Pont Company and the so-called Blumenfeld interests?—A. No, not at all.

Q. Mr. Daley, have you had any discussions or conferences of any kind with any representatives of the National Lead Company in respect of manufacturing capacity or production at any time?—A. No, sir.

Q. Had you had any discussions or correspondence with the representatives of the National Lead Company at any time in respect of price policy and price changes?—

3373 A. Will you excuse me a minute? On that previous question you said, did I ever have any—

(Previous question read.)

The WITNESS. In the early days when the original agreement was made with the National Lead Company I attended a couple of so-called technical meetings and went to visit the St. Louis plant of the National Lead Company.

Q. But other than that you had no relations?—A. No.

Q. Have you had any discussions or correspondence of

any kind with any representative of the National Lead Company in respect of price, price changes or price policy?—A. No, none at all.

Q. Have you had any such discussions or correspondence in respect of terms and conditions of sale?—A. No, sir.

Q. Have you had any discussions or correspondence of that character in respect of territories in which you sell?—A. No, none at all.

Q. Or could not sell?—A. No, sir.

Q. Any discussions or conversations at any time with representatives of National Lead in respect of solicitation of customers?—A. No.

Q. Or any such conversations or correspondence in respect of restrictions upon customers?—A. No, sir.

Mr. GESELL. That is all.

3374 Cross-examination by Mr. Dixon:

Q. Mr. Daley, do you know Mr. Corddry?—A. No, sir.

Q. You don't even know who he is?—A. I know the name as a sales manager or technical manager for National Lead Company.

Q. Have you ever met him at all?—A. No, sir.

Q. You have never spoken to him?—A. No, sir.

Q. Now, you were production manager, as I understand it, for the Krebs Company from 1932 to 1942, excluding the time that you were working for the Government?—A. Yes, sir.

Q. What were your duties as production manager? Were you in charge of the operation of the two plants of the du Pont Company that were manufacturing titanium pigments?—A. Yes, sir.

Q. Where was your office located during those years?—A. In Newark, New Jersey, and Wilmington, Delaware. And I say that because our management was at the two places and I was part of the management group.

Q. It was your duty to see that the two plants in particular, insofar as the titanium pigment branch of the business that might operate was concerned, operated smoothly and turned out the product they were supposed to produce; that was your job, wasn't it?—A. That was part of the job, yes.

Q. When did you first take over sales or have anything to do with the sales of pigments? That was in the year 1942, wasn't it, for about four months?—A. I believe it was 1942, yes, sir.

Q. Mr. Daley, do you know Mr. Corddry?—A. No, sir.

3875 Q. Well, up to that time you had not had anything to do with the sales branch of the titanium pigment business, had you?—A. The office in which I was located as production manager for that period was more or less between the offices of the general manager and the sales manager; and your everyday conduct of the business of the department necessitated your regular contacts with sales.

Q. Who was the sales manager of the company during that period of time?—A. G. A. McCorkle.

Q. But you were production— A. G. A. McCorkle.

Q. You took over his duties, did you, in 1942?—A. Yes, sir.

Q. And you acted as sales manager and production manager for about four months, did you?—A. No, sir.

Q. What position did you hold during that four-month period in 1942?—A. I was director of sales and I relinquished my production duties entirely, and Mr. McCorkle stayed as sales manager under me.

Q. So that you sort of became sales director over the previous sales manager?—A. That is right.

Q. You held that position for about four months, as I understand it, and then went with the Government on special work, or for the Government, for about two years?—A. Yes, sir.

Q. Until you recently returned; and are now
3376 manager of the pigment division of the du Pont Company?—A. That is right.

Q. Well now, I take it that from your positions which you have held with the company that until recently you did not have very much to do with the actual sales of the du Pont Company in the titanium pigment business; is that correct? A. No, I didn't have anything to do with the actual sales. I had to do—I had a rather close knowledge of the departmental policies with respect to sales, necessarily.

Q. Well, you were not directing the sales force, that is what I mean, of the du Pont Company?—A. Correct. That is right, sir.

Q. How long had you been directing the sales force of the company?—A. I did it for that four months' period.

Q. Yes.—A. And I did it for another month or six

weeks in 1944, that is as director of sales; and since then, the overall management responsibility.

Q. When you were sales manager during the period that you have mentioned, did you yourself go out into the field to conduct sales solicitations of any particular customers?—A. No.

Q. So that all of that work was done by your salesmen, is that correct?—A. Yes, sir.

Q. So, as far as any direct knowledge or experience in the field is concerned, you have no such knowledge, 3377 other than what we may have come to you from such salesmen as represented the du Pont Company in the field; is that correct?—A. I don't think I quite follow that.

Q. (Read.)—A. Yes, that is correct.

Q. So that when you made the statement that Virginia Chemical, for instance, or Zirconium was tough competition, you meant that that is what the salesmen had told you; is that correct?—A. That is evident from the—what I mean is, it is stressed in their regular reports on calls on customers.

Q. Now, as a production man of costs can you tell the Court what relation there is to production and production cost, in so far as the quantity of the product produced is concerned?—A. The effect of quantity on cost?

Q. That is right.—A. Volume.

Q. Quantity production on costs.—A. Generally speaking, increased volume will tend toward making lower costs.

Q. We are talking now about titanium pigments.—A. Yes. You asked the question then with specific reference to titanium.

Q. That is right.—A. Well, you will get your benefit of course from a certain part of your costs which constitutes the top management and some selling expense and items of that sort which you prorate over 3377a a given volume and with your direct costs being a less influence we will say.

3378 Q. Let us refer only to production costs as distinguished from sales costs. Can you state to the Court from your experience as a production manager in the titanium pigment plants of Krebs, what that relation is between increased production and lower costs, if there is any?—A. I couldn't give you an offhand yardstick on it, no, sir; it couldn't be done without referring to some quite involved figures.

Q. Is it a fair statement to make that as the production increases ordinarily the cost of production will be reduced proportionately?—A. Yes, sir, in this way, if I may amplify that.

Q. Yes, certainly.—A. Your raw material costs, usually, no; your direct labor costs, maybe a little bit; your plant overhead costs, yes, to a greater extent. Now you have got to get your relationship of your three and your sum total, and what not.

Q. Your problem as production manager from the time you held that position for du Pont, I take it, was trying to keep your productive capacity ahead of the sales; is that correct?—A. Yes, sir.

Q. And that was during the period say roughly from 1932 to 1940, when you were in that position?—A. Yes.

Q. Now, Mr. Gesell asked you about Exhibit 19, where these patent numbers were put on containers. Do you know any particular reason why they were supposed to be put on containers?—A. Not specifically, except that we already had been doing it and we were told to include these particular numbers—

The COURT. You don't know the legal consequence?

The WITNESS. No, sir. I couldn't tell you offhand.

Q. In other words, you were just following the instructions to put the process numbers on the packaged product?—A. That would be right, sir.

Q. Now, have you ever examined or read the agreement between National Lead and the du Pont Company?—A. This so-called 1933 agreement?

Q. As amended in 1941.—A. Yes, sir.

Q. Do you know whether there are any restrictions in that agreement on the sales of products by the du Pont Company, as to where they might be sold?—A. There are no specific statements in there on restricting du Pont about selling, no, sir, as I recall.

Q. In other words, under the 1933 agreement, as amended in 1941, you state that there are no restrictions on the right of du Pont to sell in any particular territory; that is your recollection of that agreement?—A. Yes, sir.

Q. When did you first read the 1933 agreement as amended in 1941?—A. In July, 1944.

Mr. Dixon. That is all. Thank you very much.

• Cross examination by Mr. WEBSTER:

Q. Mr. Daley, who are the largest lithopone manufacturers, according to volume of production?

—A. Well, I am sure that New Jersey Zinc is the

largest, I believe that is. Now, just where du Pont and Sherwin-Williams and Glidden fall in there, I don't know. But du Pont is either second or third, I believe, according to our best estimates.

Q. And Sherwin-Williams is either second or third or fourth?—A. I believe so, yes.

Q. Are you testifying that the second, third and fourth positions are uncertain, or that you just don't happen to know the facts?—A. I just don't happen to know for sure which is the larger. I know that New Jersey Zinc is the top one.

Q. And then either du Pont or Sherwin-Williams is second?—A. Yes, sir.

Q. And, then, who is the third or fourth?—A. Glidden.

MR. WEBSTER. That is all.

MR. DIXON. If the Court please, I would just like to ask one question if I may.

The COURT. Yes, of course.

Further cross examination by Mr. Dixon:

Q. You testified, I believe, Mr. Daley, that the 1932 contract form which you had found had the language on it "for buyer's own consumption". Do you know why that language was put in the contract?—A. No; but I have inquired. I have asked, I have investigated, and I 3381 think I can tell you.

Q. But you don't have—— A. Let me put it this way. We have other contracts which I found dated 1918 by other departments of the du Pont Company which carried the same wording. I have gone back as far back as 1918.

Redirect examination by Mr. GESELL:

Q. That is the 1931 form executed in 1932 that Mr. Dixon is talking about, is it not?—A. Yes. It was printed in 1931, by the printer's dating.

The COURT. You are excused, Mr. Daley.

(Witness excused.)

3388 The COURT. What page is Exhibit 1229 on?

Mr. Dixon. It is not printed, your Honor; it is a separate exhibit I believe.

We wish to make it clear that Exhibit 1229 not only includes a list of the patents but also the patents themselves listed therein. In the event any one of them may become material we thought it advisable to have the—

The COURT. Copies of the actual patents.

Mr. Dixon. That is right.

We also ask leave of the Court to withdraw present Exhibit 24 for the plaintiff which is an official list of the prices of National Lead Company for their pigments and to substitute therefor a different schedule prepared by National Lead which contains the same information and which is in little more readable form than the present exhibit.

The COURT. Why not simply substitute the new paper for the old paper Plaintiff's Exhibit 24, marking 3389 the new paper "Plaintiff's Exhibit 24"?

Mr. WEBSTER. That is agreeable. As a matter of fact it was stipulated that that might be done when it was offered.

The COURT. I recall so.

(The schedule referred to was then substituted and marked Plaintiff's Exhibit 24.)

Mr. DIXON. I believe that completes the exhibits, your Honor.

Mr. WEBSTER. I do not think there is any point at this stage in commenting in any detail on these memoranda that relate to exchange of technical information, except possibly to say this, that we produced here pursuant to subpoena several file cabinets full of information that was generally described perhaps as know-how and this is evidently the essence that has been squeezed out of that bulky material.

Mr. DIXON. I want to add a comment to that, that these exhibits were selected because of the date of the exhibits rather than particularly because of the contents of the material because, as Mr. Webster has indicated, the know-how file or material submitted to the Government pursuant to the subpoena contains several drawers full of material which, obviously, we have sampled and some of which is already in evidence, and it would be mere 3390 duplication to put in any more of that kind.

The COURT. All right.

Mr. WHITNEY. Your Honor, I think I ought to comment briefly. The first set of exhibits, as Mr. Dixon says, are to show that there was an exchange of know-how in the summer of 1932, that it began in the summer of 1932. In other words, it began in connection with the plant visits and during the course of the negotiations. That carries to Mr. Dixon a significance sufficient to warrant its being the principal subject matter of his rebuttal case.

I suggest to your Honor that it again illustrates the absence of any serious case here. We all know from

common experience that when large concerns negotiate important agreements the negotiation goes on for a period of months, frequently years, before there is a form of signature. And if the agreement is beneficial, and of course our defense is that this was at that time, in this brand-new art, they begin to operate under it at once, while they are negotiating. And so here this exchange of information started during the negotiation instead of waiting for a formal execution. In fact, the fact that the Government attaches importance to that is to my mind evidence that they misconceive what their case ought to be, if they had any.

3391 Also, I attach great significance to the fact that in their rebuttal testimony they have gone back to the period prior to November 1933 for their entire evidence. In this court of equity that seems to me to represent practically an admission that they have no case.

Now the next is that there are two exhibits, at pages 3713 and 3714, relating to Blumenfeld. They have this significance, your Honor: As he says, they filled out the file by providing letters in September 1933 and November 1933, written by Blumenfeld after the conference, about which we had such extensive direct examination and cross examination, in the summer of 1933. They are full letters in which Blumenfeld is pouring out his heart about what is interesting him, and there is no references at all to territorial matters. The subject matter is entirely the exchange of information.

And, finally, Exhibit 122-A on page 3716 is an ICI letter. The only significance I can see in it is that they show that they have no idea about what du Pont's position is in these matters. At page 3717, in the middle:

"It may be that, in view of the du Pont interest in the other Travacore Company, any broad general move to consolidate the raw material position would
3392 have to await a more complete understanding between National Lead and du Pont."

But that is merely speculation as of the autumn of 1932 and was before the English agreement in which, in any event, we had no part.

So, far from objecting to these exhibits I think that they are of no importance either one way or the other.

Mr. Gesell says, now that they are here perhaps for clarity of the record we ought to know who signed the exhibit at pages 3633 and 3634. It is not shown. I think L.E.B. would be Barton, at page 3634. And at page

3633, is that Washburn to Kingsbury?

Mr. WEBSTER. That is probably what it is.

The COURT. Is it Kingsbury to Washburn to Kingsbury?

Mr. WEBSTER. Apparently it is Washburn to Kingsbury, on page 3633, your Honor.

If the Court please, there is one other matter of mechanics that I might bring up. I was permitted to offer in evidence, and there was received, some research and sales material which was quite bulky, and I thought the Court put a very proper limitation on that in respect of possible future printing in the event that the Government is required to take an appeal in this case. I think that in the case of these patents it might be well 3393 to have the same understanding in advance.

The COURT. I think it is entirely in order to have the same understanding and unless I hear something strongly asserted to the contrary I shall assume that such is the understanding. That is expensive material to reproduce.

It usually contains documents and charts. I do not see any occasion for doing so.

Mr. DIXON. I might say the reason we felt obliged to put it in, your Honor, was in view of the rather complete exhibit by Mr. Kaegerbehn of certain patents, expressing his opinion thereon concerning them. And it is purely for reference work that they be made part of the file.

The COURT. Very well.

Mr. DIXON. Obviously, we are not interested in having them printed in full.

3712 United States District Court Southern
District of New York
Civ. 26-258

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NATIONAL LEAD COMPANY, TITAN COMPANY, INC., E. I.
DU PONT DE NEMOURS AND COMPANY, DEFENDANTS

Before Hon. SIMON H. RIFKIND, District Judge
New York, October 1, 1945; 10.30 a.m.

APPEARANCES

John F. X. McGohey, Esq., United States Attorney, for
the Government; William C. Dixon, Esq., Special Assistant

to the Attorney General, Ephraim Jacobs, Esq., Special Attorney, of Counsel, Bethuel M. Webster, Esq., and Clifton P. Williamson, Esq., Attorneys for National Lead Company and Titan Company, Inc.; Bethuel M. Webster, Esq., Clifton P. Williamson, Esq., Edward L. Rea, Esq., and Milton Handler, Esq., of Counsel. Cravath, Swaine & Moore, Esqrs., Attorneys for E. I. du Pont de Nemours and Company; William Dwight Whitney, Esq., John Logan O'Donnell, Esq., and Gerhard A. Gesell, Esq., Nestor S. Foley, Esq., of Counsel.

3713 Mr. WEBSTER. May it please the Court, before any matters in connection with the decree are taken up I should like to advise the Court we decided that it would be very helpful to us, and we thought it would be helpful to the Court, to ask Mr. Handler to associate himself with our presentation in connection with the decree, and we have done that. We would like to have your Honor accept his appearance as one of counsel for the National Lead Company and Titan Company, Inc.

The COURT. I would be glad to do it. I understand there is to be an application for an adjournment, or is that abandoned?

Mr. WEBSTER. Well, having in mind our conversation with your Honor and with Mr. Dixon and Mr. Whitney, we went as far ahead as we could and we felt the matter of adjournment might swing to some extent on what your Honor's plans are and what we are able to accomplish.

The COURT. I won't know those plans possibly before the end of the day.

Let me indicate I have received first a page proof of the findings of fact and conclusions of law. I have received from the United States a proposed decree under letter date of September 14, 1945. I have also received from the United States a memorandum entitled "Trial Memorandum No. 9," and I have received from National

3714 Lead two copies of a memorandum in opposition to the proposed decree. If anybody else has sent me any matter which I have not mentioned you had better call it to my attention now.

Mr. WHITNEY. We did not send any papers, but we might as well give them now. I appreciate your Honor may well wish to include all in one decree, but for convenience at least we thought we would make up a draft decree against du Pont as if there were to be separate decrees, and maybe your Honor will conclude they will be separate decrees.

Mr. WEBSTER. If the Court please, there is one further matter of a preliminary sort that might be taken up now. At the last meeting in connection with the proposed findings it was suggested that the De Vegh memorandum might be included by stipulation. We have a stipulation signed by counsel for the United States, du Pont and ourselves providing for approval by the Court.

The COURT. Very well. If you will hand it up I will endorse it. You can have it marked so there will be no question because there were two drafts of it. Let it be marked as NL Exhibit 34. The stipulation can be filed. You may leave it with the clerk to be filed.

Now with respect to the findings, have you gentlemen all agreed upon this proof, or are there corrections to be proffered?

Mr. GESELL. There were one or two matters from 3715 our side we want to take up on the findings, two to be exact. The first is at page 55. In the second full paragraph you will notice the words "as a practical matter" which appear in the findings. The Government I believe desires to have those words stricken. That suggestion was not discussed with your Honor at the time. We would like the words to stand. That is one matter that is open between us.

The COURT. All right. Let us dispose of that.

Mr. DIXON. May I indicate, your Honor, that we believe the findings as found by your Honor do not contain the words "as a practical matter," at least from the copy of the final findings which was turned over to us at the time of the completion of the hearing.

Mr. GESELL. Oh, well, that arose from this situation, your Honor: You will recall the Government handed your Honor pages containing their suggestions and those pages did not reflect omissions and on that page these words had been omitted,—I am sure by oversight,—so we never had this matter up before.

The COURT. Do I understand those words did occur in the draft of the findings which I transmitted to counsel?

Mr. GESELL. They did.

The COURT. But at a subsequent hearing at which we considered changes, the omission of those words was not called to anybody's attention so it was not considered?

3716 Mr. GESELL. That is the situation.

The COURT. All right. What is the argument on that, Mr. Dixon?

Mr. DIXON. Well, we regarded the words "as a practical matter" at the time of making the changes as being immaterial in a sense, and also as indicating what we felt was not of import in connection with the finding. In other words, we feel that the finding was or should be that TP was assured by DP that there would be no exports.

The COURT. Is it inconsistent with analysis of the relations between DP and NL which is embraced in other findings?

Mr. DIXON. Well, we feel that it is, your Honor.

The COURT. In what respect?

Mr. DIXON. In this respect, that it tends to indicate that there was a qualification to the statement by du Pont in connection with the assurances given that was not warranted by the subsequent action of du Pont, not only at the time of this finding but from their conduct thereafter, and that the words "as a practical matter" are not justified from the subsequent conduct, not only of du Pont in not actually exporting, but also in connection with the other findings which had been gone into at length which we submit shows the cooperation of du Pont with the combination.

The COURT. This finding is addressed to the nature of the understanding or intelligence exchanged between 3717 du Pont and the other parties conspirators in the situation at the time of the making of the agreement and the time of the exchange of the communications between du and TG via NL. That is what we are talking about?

Mr. DIXON. Correct.

The COURT. As to what was said and done at that moment the subsequent events may serve only as possible evidence if we do not know what was said and done at the time. But if we do know what was said and done at the time, then the subsequent conduct may or may not be related to what was said and done? I will hear Mr. Gesell on that.

Mr. GESELL. Well, we feel, your Honor, that the words "as a practical matter" should remain because they are consistent with your Honor's opinion indicating that what at that time was said to National Lead was the intention of du Pont Company with respect to exports, and particularly inasmuch as it appears in the paragraph where the finding is that du Pont did not agree it helps to indicate the meaning of the words there.

The COURT. All right. I will allow the language to stand.

What is the next point?

Mr. GESELL. The next one and only other one has to do with the famous finding 57 on page 36. That is the finding with respect to Canadian prices.

3718 The COURT. How did we leave it at the time of the last session?

Mr. GESELL. At the time of the last session we expressly left it open, I believe, your Honor, and your Honor said we would be in a position to submit additional facts bearing on that question. You will remember the American Producers' letter of Mr. Beschorman, and the question that arose at the time was whether or not du Pont had in fact maintained the 10 or 15 per cent differential on prices charged in Canada and there was no evidence in the record to show what prices du Pont had charged in Canada, and the record was also silent as to whether or not CIL had later sold the titanium pigments it purchased. I have worked out with Mr. Dixon a stipulation covering the du Pont facts which we would like to file in the record for the purpose of completing the record as to what du Pont charged, and when your Honor has had a chance to glance at that I can perhaps summarize it and indicate our reasons why we think the finding should be modified to exclude any reference to du Pont.

The COURT. On the basis of the stipulation are you prepared to make any modification of finding 57, Mr. Dixon?

Mr. DIXON. No, your Honor.

The COURT. You feel the stipulation does not warrant any change?

Mr. DIXON. That is correct.

3719 The COURT. Let me read the finding and then I will read the stipulation. The discussion is no longer as vivid in my mind as I wish it were but I think it will be refreshed as I see some of this material.

Mr. GESELL. I hand your Honor the stipulation.

The COURT. What was the percentage mentioned in the Producers' letter?

Mr. GESELL. 10 to 15 per cent, your Honor, Mr. Beschorman's telegram said.

The COURT. All right. Now I will hear you on it.

Mr. GESELL. If I may I will review the facts and point out what we deem of significance to the stipulation. In connection with the transactions involving BTP and Laporte, your Honor will recall there were some telegrams

and letters exchanged between Beschorman and representatives of BTP in which inquiry was addressed to Beschorman as to whether or not American Producers would maintain a price differential of 10 or 15 per cent above the British price in Canada so as to facilitate British sales in Canada as opposed to American. Mr. Beschorman said American Producers will not sell at the British price but maintain a 10 or 15 per cent differential. Some time later CIL wrote to National Lead and said, "We don't like to keep maintaining this differential and isn't there something we can do about it?" National Lead's reply to CIL does not appear in the record. There is no evidence
3720 of any CIL communication to du Pont.

Now the facts as we now have them before turning to the stipulation seem to us to be that the evidence indicates that National Lead maintained a differential of 10 or 15 per cent in view of the CIL letter, and we are proceeding on the assumption that is what the record shows.

The first point to bring out is that duPont did not maintain any such differential. Its sales to CIL were slightly above the British price after CIL assumed the Canadian duty and excise tax, but the differential, as a mathematical matter, which does not appear here, is about .3 per cent. In 1937, however, when duPont sold to CTP the price that duPont charged CTP was less than the British price; 17.6 as against 18.4, so that during the period duPont's price was both below and above the British price and never at the differential and we assume always different from National Lead's price.

The question that your Honor asked at the time of the last hearing was whether or not the differential had been maintained. We think this shows it was not maintained. The other question your Honor asked was, "How do you account for Mr. Beschorman's letter?" We feel that to the extent we can account for it it appears in the existence of this Canadian duty on American titanium pigments, of 15 per cent as compared to the Canadian
3721 duty on British titanium pigments which were zero.

The COURT. You say Beschorman said, "We will sell at a price which will, after adding duty"——

Mr. GESELL. Bound to leave this differential.

The COURT. Give the British the advantage of their Imperial preference system?

Mr. GESELL. Perhaps Mr. Beschorman also knew, except for those few sales in 1937, which were then quite in

the distance, that DP was selling entirely to CIL and CIL was not reselling, and therefore if those sales were not to be considered in Canada in the usual sense we were not participating in the Canadian market, therefore there was no necessity of doing anything with respect to getting an assurance from duPont.

The COURT. So that Beschorman was doing a favor to CIL? I should not say CIL but rather BTP in that he was announcing a policy which would facilitate a private deal between BTP and Laporte?

Mr. GESELL. Right, and which did not comprehend DP.

The COURT. And duPont's participation at all?
3722 Mr. GESELL. Right, and we think that these figures and the details as to the pricing which we now have, showing the complete absence of any maintenance of the differential are conclusive on that point.

The COURT. One of the considerations which was raised for consideration was that it seemed to me unlikely that N. L. being in competition with D.P., would in effect exclude itself from the Canadian market by agreeing to charge a price in Canada which was higher than du Pont was charging to Canadians.

Mr. GESELL. The figures indicate that N. L. had substantially greater sales in Canada than D. P. during the period. N. L. had a lower price before C. T. P. was formed and thereafter C. T. P. purchased almost exclusively from N. L., and only in one year purchased a small amount from D. P., and D. P.'s price to C. T. P. was higher than N. L.'s price.

The COURT. I see that is what you have now demonstrated, but at the last hearing I could not quite understand why N. L. would agree unless it also had the cooperation and understanding of du Pont that it would keep its price at a differential which would not leave N. L. at a serious competitive disadvantage, which you say in fact did not occur.

Mr. GESELL. Yes, sir, and in fact D. P. was not
3723 very active in the Canadian market, selling almost exclusively to C. I. L., its affiliate, if you will. Perhaps the explanation for that is the lack of rights of D. P. in Canada under the Blumenfeld patents. In any event they did not attempt to enter or exploit that market before or after this agreement.

Mr. WEBSTER. I am in entire agreement with Mr. Gesell's analysis of this from the standpoint of du Pont

and I think this can be added as a footnote indicating that the entire finding should be removed. It now develops that what Mr. Beschorman was talking about was the normal differential based upon the Canadian tariff. He also had in mind the anti-dumping provisions of the Canadian law, so that when he made the statement that American producers would sell at ten to fifteen per cent above he was talking about the tariff situation as he then saw it and understood it.

Now this is another fact not of record, but something that has been looked up since, just to check this, and that is, the actual price was never 15 per cent. It was either in some cases over 15 per cent or in some cases below 15 per cent, so that the operation of the agreement was more or less consistent with what you would expect under the Canadian tariff's anti-dumping provision.

Mr. DIXON. May it please the Court, we have one 3724 other exhibit we wish to offer in evidence in connection with this matter which we will ask an exhibit number to be left blank for at this time because we won't be able until we consult the record to tell just what it should be unless we can give it an additional number. I do not recall offhand. Perhaps the defendants can tell us what the last exhibit was.

The COURT. Is there any objection to the offering of the exhibit before we get to the number? There seems to be none. Very well, it will be received and a number retained for the purpose of receiving this exhibit.

Mr. GESELL. The stipulation has been received, has it not, your Honor?

The COURT. The stipulation is a stipulation and of course I accept it as such and in that sense it is received.

Mr. WEBSTER. It is a fairly long letter.

Mr. DIXON. I just want to offer it in evidence.

The COURT. All right.

Mr. DIXON. And secondly, in connection with this question, I would like to offer a short memorandum concerning this Canadian situation, which will take only a few moments to read. It is Government's memorandum 10.

The COURT. Government's memoranda?

Mr. DIXON. Yes.

3725 The COURT. Suppose you proceed and tell me about it, or what you want to dispose of.

Mr. DIXON. Well, would your Honor care to read that first?

The COURT. Yes, all right. I shall read it first. I have read it and will you please talk to me about it now?

Mr. DIXON. Yes, sir. Now, if the Court please, the point involved here reads: that this agreement was one to maintain prices above the prices charged for titanium pigment manufactured by British companies in the Canadian market and sold by them in the Canadian market.

Now the only additional evidence which du Pont has submitted here is evidence of sales made to CIL during the years 1934, 1935 and 1936, and then the sales made by or sales made to CTP in 1937, at which time the report, as your Honor will recall, indicated that there was really another company selling in the Canadian market.

Now we have here a question similar in many respects to that involved in 1933 where assurances were necessary concerning what the American producers would do. That is what BTP was asking, and that is what Laporte wanted to know. They were not inquiring whether du Pont was selling in the Canadian market. It may well have been that they were making sales only to CIL, but,

3726 however that fact may be, it was also possible that they would make other sales to other persons other than CIL, because there is nothing in this record to indicate that Laporte had any knowledge of the fact of these agreements. They are referred to in the memorandum. So what was necessary was that the position of the American producers on sales, if any, in the Canadian market be made clear to Laporte.

The COURT. So that Laporte would know when it was getting a percentage of the market it was getting a percentage of something real.

Mr. DIXON. That is right; that it was not just something that would be cut down by du Pont coming into the market and selling against the Laporte product.

So these sales, and that is the only additional evidence that is offered by du Pont, are certainly not what I would term competitive sales in any sense of the term, but even regarding them as sales from one point of view, it is significant, as pointed out in the memorandum, that the sales made by du Pont to CIL were above the prices of the British Products. In other words—

The COURT. Let us get it clear what we are talking about, because we do not want to get lost.

Mr. DIXON. That is right.

The COURT. What you mean is, taking the net price to

du Pont and adding thereto the tariff and delivery charges, D. P.'s delivered price to CIL in Canada, 3727 was higher than if CIL had acquired the same quantity of titanium oxide from a British producer, or Laporte.

Mr. DIXON. That is right.

The COURT. Now, by how much higher? Mr. Gezell says it is some infinitesimal percentage.

Mr. GEZELL. .3 is the percentage, your Honor.

Mr. DIXON. Well, it was above the British price.

The COURT. Well, the significance of that is this, and I do not want to lose you by interrupting you—

Mr. DIXON. That is perfectly all right, your Honor.

The COURT. If we had evidence of a proposed agreement "above," and we found .3 per cent increment above, that might justify the finding, but where you have an agreement which says ten or fifteen per cent, and that is the only evidence we have to support the findings of "above," and then the fact is that the evidence shows a percentage of .3 per cent, then have you got sufficient other facts which tie in with your evidence, and, consequently, does that justify the finding?

Mr. DIXON. Our answer to that is still yes, your Honor.

The COURT. And why?

Mr. DIXON. For the reason that the sales to CIL on the documents we have referred to in our judgment 3728 cannot be regarded as ordinary sales to a consuming member of the public in the Canadian market as such.

The COURT. Why not, if du Pont had not been selling, perhaps Laporte could have sold it, or BTP might have sold it.

Mr. DIXON. Well, under the arrangement existing—

The COURT. Assuming Laporte had not had any real hope of making the sales whilst D. P. were engaged in making the sales with CIL, nevertheless why isn't it a sale?

Mr. DIXON. You mean the sales from du Pont to CIL?

The COURT. Yes.

Mr. DIXON. Certainly I do not think even du Pont would disagree with the $1\frac{1}{4}$ per cent discount, and that is what it amounts to from the American price which they gave to CIL, and which was given to CIL because of the relationship between CIL and DP, and which would not have been available to any other person in the Canadian

market had du Pont been free to have sold in that market.

3729 The COURT. Well, we have the discount, and the discount does not explain the discrepancy between the 10 and 15 per cent and the .3 per cent. If it did it would completely clinch your case, that is, if the normal discount from du Pont to CIL was equal to the difference between the agreed upon differential and the actual differential, then your case would be clinched, but the unfortunate thing or fortunate thing is that it does not fit, because you must realize that when you have a fact, that if you really do not hit upon the truth the small elements do not tend to fit together. In other words, where we have only arrived at a partial truth, there is a condition existing where you do not have freedom from jagged ends, and this seems to be one of those jagged ends.

Mr. DIXON. Supposing, for example, that du Pont made no sales at all in Canada, what would have been the situation then?

The COURT. I don't know.

Mr. DIXON. We would still contend, as we have in our argument—

The COURT. Then it is possible that we would draw certain inferences from the general relationship between the writer of the letter and what occurred from the text of his letter and arrive at one or the other of those inferences, and then we would check against the available material. It would be like a finding based upon scientific inferences where you had nothing to prove it. However, you have a fact which tends to disprove it.

Mr. DIXON. The question as we see it gets down to this, your Honor: Whether your Honor regards these sales to CIL as sales which were made in the competitive process by du Pont or whether they are to be regarded as isolated sales by du Pont to its Canadian partner, which, in our opinion, explains the reason for the discount, and which in turn explains the reason why the differential or the price actually paid by CIL was not within the 10 or 15 per cent markup theretofore agreed upon.

The COURT. Let me ask you this—

Mr. DIXON. Yes.

The COURT. Do you find evidence of NL sales in Canada?

Mr. DIXON. NL sales, your Honor?

The COURT. Yes, to other consumers in Canada.

Mr. DIXON. Through agents.

The COURT. Through agents, and the prices, the delivered prices of NL to its Canadian customers, were 10 or 15 per cent above the British prices, is that right?

Mr. DIXON. You mean actual sales to the public now as distinguished from whatever relationship NL had with its Canadian agencies?

3731 The COURT. Yes.

Mr. DIXON. Concerning which we have no evidence except that it may have been that they were shipping on a consignment basis or any other basis.

The COURT. Well, on such evidence as you do have, does it show 10 or 15 per cent markup as against British prices?

Mr. DIXON. Yes, and it shows—

The COURT. Now is that reflected so that a man who bought on the American basis, actually paid more money than on the British basis?

Mr. DIXON. That is correct.

The COURT. Assuming he had NL products?

Mr. DIXON. That is right.

The COURT. And to that extent the American producer was operating above the British producer?

Mr. DIXON. That is right.

The COURT. It gave them a private tariff price?

Mr. DIXON. That is correct.

The COURT. Now you do not find affirmatively that du Pont sold in the Canadian market on any such basis?

Mr. DIXON. Yes.

The COURT. So we can't get away from the affirmative evidence. That is A.

And, B, as I understand it now, you do find some sales by du Pont to a specialized class of consumer,
3732 to wit, CIL, which is at odds with this arrangement.

Now you say you can explain this "at odds" by saying there is a unique kind of customer, but you know that in an industrial product of this kind everything becomes more or less fungible which enters into the stream of commerce in some form or other, and if a gentleman can buy from CIL titanium which it bought from du Pont at a less amount than that which he or they bought from Laporte, the fact remains that you would expect a closer and more faithful application of this agreement, if it were

an agreement between du Pont and CIL, who were deeper in the British family than NL was, isn't that so, because they had several relationship lines running in- to CIL?

Mr. DIXON. Well, except that we find here that in 1936 CIL, the Canadian partner of duPont, is clearly expressing its accord with this agreement.

Now there again we submit it is immaterial whether CIL was selling the product, and if it bought from duPont or not, it was recognizing the agreement.

The COURT. There is no doubt about that. In fact, we have a subsequent letter which says in effect, "Let us quit. This is not producing. We no longer need it."

I have not any doubt in my mind that NL agreed to maintain a price differential in Canada; and I do not think that is disputed. The question is whether DP likewise 3733 agreed, and whether it agreed with NL.

Mr. DIXON. That is correct.

The COURT. I would be inclined to find as I did find, because of the absence in documentary evidence I would say that there was enough shown of a cooperative atmosphere here in an effort to play ball so that if NL agreed and NL acted as it did, it is not unwarranted that DP was involved, so that DP authorized it in some form or another.

Mr. DIXON. It seems to me, your Honor, that this exhibit that we offered explains or at least presents our point of view on this as well as we can state it ourselves.

The COURT. You mean this memorandum?

Mr. DIXON. This is an additional exhibit that we offer. We offer it only because it seems to us that it again is comparable in a sense to the statement by Ewing. It is a statement of the obvious.

The COURT. Let me see it, please.

Mr. DIXON. Yes, sir. We direct your Honor's attention to the last paragraph.

The COURT. This is 1931.

Mr. DIXON. That is right.

The COURT. Well, now, this agreement is supposed to have been made in 1935.

Mr. DIXON. Correct. That is our point, your Honor, that the whole understanding here as to whether 3734 assurances were or were not given cannot be regarded as an isolated transaction in the sense that you can take the sale to CIL and say that that was a sale

separated entirely from all these transactions. We explain that sale. We show the reason for it at that price, but we still say that that does not show and it is not evidence which would overcome a positive statement by a co-conspirator after the conspiracy has been in fact joined as to what the American Producers would do, and the statement there in that exhibit, again which we feel is the obvious, that duPont was making a deal or speaking for their Canadian customer or Canadian partner, and those assurances were recognized, as we have pointed out in the record, by CIL, and we can go no further than that to support our position, because obviously, as your Honor knows, there is no positive evidence or oral evidence that we could get in. Now, this actual understanding must be based on inferences.

Mr. GÉSELL. Of course, I would like to point out that when you are not a party to an agreement it is also hard to get positive evidence that you are not, and we did not have anything to do with it.

The Court. Of course, this placed in the general background of the situation does not throw any light on the immediate problem, which problem is this: Where you have a general situation of this kind, it is true that you can draw certain inferences, and the general 3735 situation here I think would warrant the inference that duPont was included in an authorized way in the word "producers," but like all inferences of that broad character where you find something which throws very serious doubt upon it, there is then the logical line which snaps, and then you are left with just the broadest kind of situation, because DP and NL were involved in an agreement and, as a result, therefore, you can infer a great many specific agreements, which again, of course, is an inference and I do not think any system of logic would sustain it, as it gets too thin, and the mere fact that there was such an agreement does not warrant the inference that on a particular day they made a deal for a specific purpose to put X out of business.

Mr. Dixon. Well, we would be inclined to agree to that, your Honor. However—

The Court. This is all it comes down to: We have a general situation which normally would warrant the inference that when they made an arrangement for Canadian prices, duPont and NL would both be in it, but we have evidence that in fact duPont was not in

it. Now I think we will have to strike or modify this finding. How do you want to modify it?

Mr. GESELL. Are you speaking to me, your Honor?

The COURT. I am speaking to Mr. Dixon. Maybe you want to retain the wording that NL did make this agreement with somebody, which, of course, is clear.

3736 Mr. DIXON. Well, as pointed out in our brief there was a Canadian price agreement, and it seems to us there is absolutely not even an open argument on the record to contradict that.

The COURT. Yes.

Mr. DIXON. Now the question is who made that agreement and with whom was the agreement made.

The COURT. You now have evidence that NL made the agreement with CIL and made the agreement possibly with BTP, as to which you have documents, and I think that is obvious.

Mr. DIXON. That is right.

The COURT. And maybe as to Laporte, but I do not think you can put in Mr. duPont. How do you want the language modified? Do you want to say that in 1935 NL agreed with CIL and the other parties that you mention?

Mr. DIXON. CIL, BTP and Laporte.

The COURT. NL agreed with CIL, BTP and Laporte?

Mr. DIXON. Yes.

The COURT. To maintain prices on titanium pigments sold by NL in Canada above the prices charged and so on?

Mr. DIXON. Yes, your Honor.

The COURT. All right. Do you all have the change?

Mr. GESELL. Yes, your Honor.

The COURT. All right.

3737 Mr. DIXON. May I for a brief moment suggest that we feel in view of the documents referred to in the memorandum, your Honor, that because of the relation between CIL and duPont, as clearly shown by these documents, requiring consultation and so on, that there should be some reference in this finding to the relationship or to these documents, which by your Honor's finding is completely written out of the record as of no import? We feel that it is important.

The COURT. You mean these findings do not reflect any kind of relationship between du Pont and CIL?

Mr. DIXON. Your Honor, the findings—

The COURT. I understood that there was not only questioned the relationship but there was given the precise percentage in four decimal percentages of their stock ownership.

Mr. GESELL. That is correct, your Honor.

Mr. DIXON. Yes, that is correct.

The COURT. And that ICI was the other partner and, of course, the record also shows that ICI was one of the important partners of BTP. If you want to rely on the consanguinity you have the story there.

Mr. DIXON. All right.

The COURT. Are there any other elements in this finding?

Mr. WEBSTER. I think if your Honor is disposed to retain the finding at all, the analysis that has now 3738 been made of it by your Honor would warrant changing it to read that in 1935 NL agreed with BTP to maintain prices on American titanium pigment.

The COURT. And not with CIL?

Mr. WEBSTER. And not with CIL or Laporte.

The COURT. I think one of the letters which was introduced in connection with CIL speaks about the agency.

Mr. WEBSTER. That was a long time later and did not relate to the arrangements which had to do with the new BTP situation.

The COURT. Well, wouldn't it warrant the inference that CIL knew about this arrangement and cooperated in this arrangement that NL made with BTP?

Mr. WEBSTER. Well, you are referring to the arrangement that was made in 1935, which was to facilitate the price agreement with BTP and Laporte?

The COURT. True.

Mr. WEBSTER. But CIL was the outlet of BTP in Canada. CIL knew about the arrangement, that is, it came to its attention at some time, and later it did write the letter that your Honor refers to.

The COURT. Well, I think that would warrant the inference that they participated in this agreement.

Mr. WEBSTER. If that were so, it might be more accurate to say that in 1935 NL agreed with BTP 3739 and perhaps with the knowledge of CIL.

The COURT. I think that is an over-refinement. The actual business here was conducted between them. In other words, this CIL never knocked at the door of NL and said, "Why are you charging me higher prices than I can get from BTP?" They certainly knew about it.

They acquiesced in it. Therefore, I think I will let it go at this.

Mr. WEBSTER. How about the reference to Laporte?

The COURT. Laporte, of course, was the beneficiary of this whole arrangement, and undoubtedly it was executed at the instance of Laporte.

Mr. WEBSTER. That is true.

The COURT. So I suppose they can be called partners to this agreement.

Mr. DIXON. Your Honor, I am wondering whether in view of your Honor's other finding with reference to the relationship between CIL and du Pont, you would consider adding to this finding, as we feel it is justified, the following:

"That in view of the arrangement between CIL and du Pont I infer that du Pont had knowledge of this agreement."

The COURT. What do you say to that?

Mr. GESELL. Well, I am not for it, your Honor. I think that raises the question that came up in our long conference on the findings, and where it was pertinent to a finding to have it rest on that inference
3740 your Honor indicated he was so inferring. But where the finding here excludes du Pont, I see no need of referring to an inference which, after all, your Honor must take into consideration in connection with the finding.

The COURT. Mr. Dixon, how would this in any way affect the case against du Pont? Assuming du Pont did have knowledge of this agreement, how would it in any way vary the result?

Mr. DIXON. Well, it would give the Government certainly the argument from this finding that du Pont acquiesced in and to that extent aided in this price agreement.

The COURT. That you are not warranted in finding, and if that knowledge would permit such an assumption, then I should deny it, because the reason why it was struck out was because of the fact that the evidence indicated that they did not aid.

Mr. GESELL. Your Honor—

Mr. DIXON. If I may interrupt for a moment—

Mr. GESELL. I was the one who was interrupting.

Mr. DIXON. —the position that we are in is that we have the positive finding, or, I mean we have the positive language—

The COURT. No doubt about that.

Mr. DIXON. —and we feel you cannot surmount
3741 the difficulties of presenting a positive truth here,
but to say there was no inference of any discussion
in view of the 1933 discussion between Rupprecht and
Beschorman concerning the Canadian market and so on,
that this matter was never discussed, that they have no
knowledge of it, we believe that certainly such positive
language should not be excluded.

The COURT. Well, let us skip all of that. I have not
any doubt in my mind that du Pont knew about it.

Mr. DIXON. Well, that is all we are asking, your Honor.

The COURT. The one other thing, of course, is that they
were in this business and of course they knew about what
the market situation was, but the question, the only ques-
tion between you or the one, rather, that I want you to
address yourself to is why should I say so? In what way
does it affect the result?

Mr. DIXON. Well, I believe, your Honor, I stated my
position on that. At least it gives us the opportunity to
argue for whatever value the argument may have in the
event that it becomes material, that to that extent du Pont
must have known about the arrangement and could not
have been without knowledge of this instrument.

Mr. GESELL. Your Honor, he has that argument in any
event, doesn't he?

The COURT. There is no doubt about it.

3742 Mr. WHITNEY. Could I recall what happened with
respect to the major Canadian contracts?

The COURT. Yes.

Mr. WHITNEY. In finding 56 on page 34, your Honor
there referred to the inference that du Pont had knowl-
edge, and then went on to say that it obviously required
proof to make that inference, but that there was no evi-
dence as to whether that was proved or whether it was
disproved, and perhaps that was proper to do in respect
to a major contractual arrangement. However, as Mr.
Gesell points out, here is a contractual arrangement which
is so indefinite that we do not even know from the evidence
how long it lasted.

The COURT. That is right.

Mr. WHITNEY. And it seems to me that Mr. Gesell's
statement is proper, which he made in his argument, that
an inference doesn't further the finding in any way.

The COURT. All right. I will leave it out.

Is there any other change proposed or are there any
other changes proposed with respect to the finding?

Mr. REA. Yes, sir, one other minor change, page 12, second line. We would like to have inserted after "was cancelled" the words "by agreement".

The COURT. Page 12?

Mr. REA. The line at the top of the page.

The COURT. "The license from the defendant NL 3743 to Zirconium was cancelled on March 9, 1944."

Mr. REA. We would like to have inserted after the word "cancelled" on the second line the words "by agreement".

The COURT. That is after the words "was cancelled"?

Mr. REA. Yes, sir, after the words "was cancelled".

The COURT. Do you have any objection to that?

Mr. DIXON. I believe we did object to it at the time, and your Honor decided not to put it in.

The COURT. I do not recall it.

Mr. DIXON. Because of the inference that it was mutually satisfactory and so on that this agreement be cancelled.

The COURT. There was a formal agreement, wasn't there?

Mr. REA. That is right.

The COURT. And it has an exhibit number?

Mr. REA. That is right.

The COURT. What is the exhibit number?

Mr. REA. I can't tell you offhand.

The COURT. I will put in "was cancelled by agreement Exhibit blank," and you will fill it in. The reason I put that in is because if you write in the words "by agreement" it might mean some degree of mutual satisfaction of some kind, whereas what we mean is by an instrument.

Mr. REA. Yes, sir.

3744. Your Honor, if you will turn to page 18 in finding 42, the second from the last line, there the statement is made just as we asked for it.

The COURT. I said I am giving it to you with the words "by agreement, Exhibit blank."

Mr. REA. All right. There is no exhibit number given here, but that is all right. We are perfectly willing to put in the exhibit number.

The COURT. Let us not go back to that, as, I understand it, nobody is complaining about that now.

Mr. REA. Then we would like to make the same change on page 63.

The COURT. Where is that?

Mr. REA. In the second full paragraph.

The COURT. In No. 84?

Mr. REA. Yes.

The COURT. What more do you want there?

Mr. REA. Well, we want to say that the agreement was cancelled.

The COURT. There is a difference between cancelling a license which conceivably might mean a unilateral act and saying that an agreement was cancelled. That necessarily means a bilateral act. So you really do not need anything more there.

Mr. REA. All right.

3745 The COURT. Any other changes?

(No response.)

The COURT. I have not taken the trouble to read all this.

Mr. GESELL. We have done that, your Honor.

The COURT. I am relying on the several very able lawyers here to do that for me, and with the two minor changes or several minor changes that we made this morning, if you will give me a final and complete copy I will sign it and file it.

Mr. GESELL. We thought, your Honor, we would try to get it out to the printer right away. However, there are some typographical errors—

The COURT. I would assume so.

Mr. GESELL. Mr. Jacobs, Mr. Foley and Mr. Rea have all been carrying on the work so that we could have it done immediately.

The COURT. I shall not reread the instrument. I am relying upon you to make any typographical corrections that are involved, and at the same time also make whatever other corrections are necessary so that such corrections will carry out the rulings I made at the last set of hearings, and I will ask the clerk to file this stipulation, and you will also please supply me with a number for this unmarked exhibit that we have spoken about.

Now we go to the decree. Have you gentlemen
3746 decided as to whether you are going to offer any evidence?

(No response.)

The COURT. Take it the answer is no.

Mr. WHITNEY. Your Honor, we did not feel like rising and talking at this particular moment and would not have done so but for a certain point suggested by Mr. Dixon, which with great respect to him is unthinkable as an issue or which may become an issue.

The COURT. Then you will want to be heard on it?

Mr. WHITNEY. I might like to put in a very small amount of evidence.

The COURT. All right.

Mr. WEBSTER. Well, inasmuch as a record is being taken here, I do not want to be put in the position of indicating by silence that we shall refrain from offering evidence in the event that it becomes material on the issue referred to by Mr. Whitney.

The COURT. Very well.

Mr. DIXON. I might add this word to what has been stated by counsel for the defendants: The Government also, depending upon the progress of this argument, reserves to itself if necessary the right to present further evidence.

The COURT. Yes. Will one of you please just do one thing for me: Call my attention to which paragraph it is of this proposed decree that provides for four corporations?

3747 Mr. DIXON. 9.

Mr. WEBSTER. 9.

Mr. DIXON. Page 5, Judge.

The COURT. Yes.

Mr. DIXON. I might add, your Honor, there is one slight error on page 5. The first paragraph, paragraph numbered 8 of the proposed decree, that should be paragraph 9.

The COURT. You mean the middle of that page?

Mr. DIXON. The middle of the page; it should be paragraph 9.

The COURT. It says paragraph 9, Counsel.

Mr. WEBSTER. It is 9 in the amended one.

Mr. DIXON. That is what I thought.

The COURT. Well, I do not have any amended one.

Mr. GESELL. I do not think you saw the first one, your Honor.

The COURT. All right.

Do you want a record made of the discussion which will be relatively informal from this point forward? It is up to you. If you want to pay the reporters you are at liberty to do it, but this is not a WPA project and you do not have to do it.

Mr. WHITNEY. Unless your Honor strongly opposes I would rather have it taken down. I think it may be helpful later.

3748 The COURT. All right.

Mr. WHITNEY. As I think I indicated, your Hon-

or, I do not think this is a case where there is necessarily going to be an appeal. I think much depends upon the course that the argument may now take on the statements which will be made, so that in reading over the minutes after the hearing is closed it might be a great help.

The COURT. Very well. As long as one of you want it I am sure the reporter will report it anyway.

Mr. WEBSTER. We are agreeable, your Honor, to having a stenographic record.

The COURT. Now, Mr. Webster indicated in a memorandum some of these provisions he had no objection to under the decision as rendered. If you will give me those numbers I will check those off and read them as a block or treat them as a block.

Mr. WEBSTER. Well, in general we do not now contest in connection with the framing of this decree paragraphs 1 through 7.

The COURT. 1 through 7?

Mr. WEBSTER. 1 through 7. We will suggest some minor modifications in paragraphs 1 through 7. We do oppose paragraphs 8 and 9 in their entirety. We will suggest some substitutions for paragraphs 10 and 11, and I believe paragraph 12.

The COURT. What about 12?

Mr. WEBSTER. Just a minute, please. I have forgotten what 12 is at the moment. We are suggesting a substitution for paragraph 10.

Mr. WHITNEY. Your Honor, we have some points on paragraph 1.

The COURT. I know. We will come to that in due time.

Mr. WEBSTER. We have some suggestions and additions concerning paragraph 11. We have a substitution to suggest for paragraph 12. We have a proviso that we should like to add to paragraph 13, and suggest that paragraph 13 subparagraph 2, be removed. We have some comments to make about paragraph 13, subparagraph 3.

We have no present suggestion about paragraph 14, which is the usual visitation provision.

The COURT. Mr. Whitney or Mr. Gesell, whichever one of you desire to be heard.

Mr. GESELL. Does your Honor want to hear us on all the paragraphs?

The COURT. No. I just want to get a general idea. If there are any of them which are excluded or any on which there is no dispute, you need not comment on those paragraphs.

Mr. GESELL. We have some problems on paragraph 1, the definitions.

3750 Mr. WHITNEY. I might say for convenience, your Honor, that it is apparent that paragraph 1 ties in to the later substantive items about licensing, and I think if we start at 1 we will be starting at the back end of the problem.

The COURT. All right. However, as I gather it the biggest problem here is going to be this divestiture problem, and maybe also the free royalty scheme, and the know-how, and perhaps this foreign divestiture business. I take it that those are really the three crucial points that we have under discussion. I take it, Mr. Dixon, that you will want to open up.

Mr. Dixon. All right, your Honor. I shall direct my remarks to the question of licensing first.

The COURT. Give us in a brief outline, please, the general scheme that you have envisaged by which you hope to attain the objections outlined, namely, the elimination of the restraint on trade and the achievement presumably of a competitive system in this industry. Now what is the general scheme as you see it?

Mr. Dixon. At the outset we feel that in view of the present position in this industry of the two defendants in which they have a capacity, as I understand it, of approximately 70,000 tons for National Lead and around about 50 for du Pont, it is necessary if there is to be any real competition restored or effected in this industry, 3751 that there be a divestiture of some if not all of the operating plants of the defendants which will make real competition a fact.

Now, this industry at the present time, as the record shows and as your Honor well knows, is completely dominated by the two defendants, who have 100 per cent of the business in the extended field and approximately 90 per cent in the pure field. The only other companies in the business, the two licensees of duPont, have plants which have a top capacity at the present time based upon the restriction in effect about or prior to the filing of this suit, of 9000 tons a year, for less than 10 per cent of the total production.

Now, with the two defendants operating as they do plants producing 100 per cent of the composite and 90 per cent of the pure pigment, the Government feels that there would be available the opportunity to con-

tinue the domination of this industry by the two defendants principally because of the present position which they enjoy in that industry, comparable we feel to a practical monopoly in fact and in practice.

To effect, therefore, any real competition and to enable even the present two companies, the licensees of duPont, to engage in both the composite as well as the pure field, it would be necessary in our opinion to bring them down to at least a comparable level in the sense that there is some kind of a balance among the 3752 companies that would then be operating in the industry.

The COURT. Let me ask you a question.

Mr. DIXON. Yes, sir.

The COURT. And this is purely reflection in response to your argument.

Mr. DIXON. Yes, sir.

The COURT. Let us hypothetically assume that at the close of this case we had found a situation, not the one we did find but that one company dominated the field, to wit, NL-DP; that this one corporation occupied one hundred per cent of the extended field and 90 per cent of the pure.

Mr. DIXON. Yes.

The COURT. Then let us suppose it was determined to break that up because it had been achieved by violations of the antitrust laws—maybe I am suggesting a situation akin to the Aluminum Company although not with respect to percentages. Then suppose the defendants had suggested that the company be split into two companies, each of whom would engage both in the manufacture of pure and extended pigments, of approximately equal size, say one to have about 45 and the other 55, or 50-50, or 47-53, and that appropriate steps were taken so that there would be genuine competition between those two companies in the sense that the directors of the two companies were completely separated, bringing about a split-up of the old board into new and 3753 independent boards and so on; would you think that would be regarded as a measure designed to carry out the purpose of the antitrust law? Do you have my question in mind?

Mr. DIXON. Yes, your Honor, and I think it goes right to the crux of the case assuming that there were no other companies in the industry, but, the point that I am arguing, is that the Government would specifically say

that we did not feel that would be sufficient for the reason that it would then allow either company to have about 50 per cent of the industry standing alone. True, there might be competition between those two companies, but from experience in other matters we found that 35 per cent in a given industry may be sufficient in and of itself to set the pace for everyone else in that industry.

The Court. Where the others are 5%, 6% and 7%?

Mr. Dixon. That is right.

The Court. But how about where the others are also 35 per cent?

Mr. Dixon. Where the others are of the same percentage, 35 per cent may not be enough assuming that you have, as we would have to assume here, fair and open competition. It might be sufficient, but it would depend upon the particular industry; the incentive that there might be for new capital to come into that industry under those circumstances, and I might add that the Government today in the aluminum case, to get back to that although that is not on all fours with our situation, but nevertheless the Government has found that even though the Court has decreed the possible dissolution—not at the present time, they want to defer the action—that there is an extreme reluctance to the point that there is practically no one who is interested today in going into the aluminum industry in the sense that they will buy or put additional capital into the surplus war plants formerly operated by the Aluminum Company. And the only explanation is that until the new capital feels that they have at least a comparable or reasonable chance of competing, that the size and the position of the company in the industry is sufficient to deter any new capital from having any interest in the industry, on those facts.

The Court. Well, did you suggest in the dissolution of the Aluminum Company anything in the way of how many companies should be formed out of it?

Mr. Dixon. No, your Honor. It never reached, as I said, and has not reached the stage or the question as to what form dissolution will take, assuming that that is what the Court finally does, and in the opinion of the Government that will probably be the ultimate action that will have to be taken. Certainly it would not meet the views of the Government to break up the Aluminum Company into two companies leaving each company with about 40 per cent of the in-

dustry under its control.

Mr. WHITNEY. Might I interrupt a moment? I want to raise something in the nature of a jurisdictional point if Mr. Dixon will permit me.

Mr. DIXON. Certainly.

Mr. WHITNEY. And I think that the least I can do is to state in the nature of a warning the position I am going to take so he can address himself to it.

The COURT. Yes.

Mr. WHITNEY. I am going to take the position that we are now confronted with what I think is a genuine fraud on the part of the prosecution. I will put that on the record. This case was publicized as a perfect test case on international cartels. There is not one word in the press about divestment; there is not one word in the complaint; there is not one word in the record; there is not anything to this claim, and there is not the remotest justification that this Court or any other court on appeal on this record would consider this question or listen to this argument.

The COURT. Well, your point has been made in Mr. Webster's memorandum, and it is unquestionably one of the problems we will have to struggle with.

Mr. WHITNEY. I charge fraud.

The COURT. We won't take that as the announcement of the institution of an action in deceit. So please go ahead.

Mr. WHITNEY. Your Honor, I want to suggest at the outset that your Honor should consider this as a jurisdictional matter, and I object to your Honor considering this question.

The COURT. I looked at the complaint and it says to take such measures as in the opinion of the Court would accomplish the purposes of the act, or some such very general language. I suppose it is broad enough to enable the Government to suggest most anything.

Mr. WHITNEY. That is precisely the point I want to argue, because I believe your Honor's supposition of it may reasonably be completely unfounded. In other words, I do not feel that that is the law, even in its most extreme and imaginative aspect, and I do not feel for one moment that the justices on the Supreme Court who dissented in the Hartford-Empire case would consider that equity has arrived to the point of degradation so that it would be represented by trying a case on a 51-page complaint, and then with seven specific para-

graphs of prayer, and then at the hearing on the decree, which is the point of the whole case, have it consist of a discussion of a completely different form and completely unrelated relief that can only be based upon a completely different charge in a completely different case in evidence, and justify it under the phrase that the plaintiff has such other and further and different
3757 relief. Now, your Honor, that is not distortion of language; that is murder of a language.

The COURT. Well, I did not hang that on that clause in the complaint.

Mr. WHITNEY. Will your Honor kindly assist me and state any other clause that is remotely related to it?

The COURT. If you will give me a copy of the complaint I will be able to read the complaint.

Mr. WHITNEY. I will raise the jurisdictional point.

The COURT. There is also a paragraph in the prayer which is rather broad, to put it modestly.

Mr. WHITNEY. Prayer No. 5, that the Court adjudge and decree that the defendant and so on.

The COURT. I am taking time to get the steam out of the semantics.

Mr. WHITNEY. You will not get the steam out of this, your Honor; it will stay there to the last minute. There will be no relaxation of the heat.

The COURT. Well, as far as the foreign divestiture is concerned, that is paragraph 5.

Mr. WHITNEY. Yes, sir.

The COURT. I assume that is paragraph 5.

Mr. WHITNEY. Yes.

The COURT. And as far as the royalty situation is concerned, I suppose that is paragraph 6 and paragraph
3758 7. I do not find any specific paragraph, but still I can't get excited about the prayer for relief. I do not think prayers for relief are very important elements of the complaint in any way.

Mr. WHITNEY. I agree with your Honor. I think that is so, but that is not the point I am making to your Honor.

The COURT. No, I understand your point.

Mr. WHITNEY. The point I am making to your Honor is that before the court introduces a judicial branch of the Government into the investments of thousands and hundreds of thousands of people and into an industry, the Court has to have some knowledge. Now your Honor may have great knowledge, knowledge that you may have acquired independently, but if the judicial process is going

to operate it has got to be upon a complaint and upon evidence introduced under the complaint. I am not talking merely about the prayer. That is just the most dramatic way to point it up, but there is nothing in the complaint about it and there is nothing in the evidence about it, and in addition there is no remote conceivable basis for your Honor to take action upon it.

In the aluminum case that was the problem. The Aluminum Company had by acquiring plants built up an alleged monopoly, and the question in the case was whether that should be broken up by divestment of plants, and that was the issue charged and that was the issue tried.

3759 Now, there has not been a word of evidence in this case along those lines and so your Honor has no basis upon which to consider the question.

The COURT. Very well.

Mr. WHITNEY. So that I am respectfully making a motion that this subject be barred from this discussion. It is a sheer waste of time, and it is a reflection upon our judicial system to even entertain it.

The COURT. Very well. That reflection may remain. You may proceed.

Mr. DIXON. I might state briefly that at the time of the opening statement of counsel—

The COURT. No. Please let us not go into that.

Mr. DIXON. All right.

The COURT. Let us hear the proposition on the merits.

Mr. DIXON. Now, that was the reason why the Government is asking for the type of divestiture suggested in paragraph 9 of the proposed decree.

This is, relatively speaking, your Honor, a young industry. The position which the defendants today enjoy in that industry is one resulting from, in the view of the Government, this combination, and for the reason I gave a moment ago if this industry is to be thrown open so to speak to companies who actually and sincerely desire to enter into this business, and I think the record
3760 clearly shows that this is a coming business in the sense that titanium pigments are rapidly and soon undoubtedly will effectively eliminate lithopone, for example, entirely from the market, so that if the position of the defendants is to be maintained, it would mean that they would have for all practical purposes between the two of them approximately 50 per cent of the production of the composite field, which is perhaps a field in which they are forging ahead, as the record shows, with those new type of pigments all the time, and not the pure pigment. The pure pigment, as your Honor recalls, is the basic pigment.

Now, what incentive is there going to be for any new enterprise to come into this industry? That is point one.

Point two is, what about the present condition of the two other companies, the only other two companies in this industry fettered and shackled as they have been in their capacity to expand by the du Pont restrictions?

I say that competition as we view it means some kind of an equal opportunity to compete upon a basis where the price or the cost of production and those other elements which enter into the determination of the ultimate price of that product to the consuming public are comparable for all competing companies.

Now from that arrangement, as I have indicated, the defendants, even assuming that these contracts are cancelled, are still going to be in the position in the industry in which they are today, and where they will continue to dominate and be in a position to dominate this industry, so that as a practical matter the Government contends that to meet that situation there should be competing companies created by the defendants in this industry where they each have the two plants, separate plants, which subjects itself to an arrangement whereby partial or complete divestiture of those plants could be worked out upon a plan to be submitted once the principle is established that that is to be done, so that if it were accomplished what we would have here in this industry would be six companies, four of which would be independent and would have at least a comparable productive capacity. They would still be ahead of the other two companies, the licensees, but that is a condition and a condition that we are taking into consideration in asking that the four companies be set up to make more certain the fact that when this industry is open that we will not have two companies with a capacity of 100 per cent of the composite, 90 per cent of the pure, or if you want to put it the other way, each one of them with 50 per cent of the composite, 45 per cent of the pure, and the only other two companies in the business being only in the pure field with a capacity of approximately 20 per cent of the present capacity of the defendant companies.

Now it might well be that—

The COURT. Let me see if I can understand your point.

3762 Mr. DIXON. Yes, sir.

The COURT. You visualize a situation in which your four companies would be created out of the existing two, and the two already in existence, so that would make

six companies, none of whom at the time they get started have anything more than about 25 per cent of the field?

Mr. DIXON. That is right.

The COURT. And you feel that with the six companies operating there will be a fair amount of competition, and the inequality in size will not be such as to stifle competition?

Mr. DIXON. Yes, sir.

The COURT. Now first let me ask you about a few premises that you seem to have accepted.

Mr. DIXON. Yes, sir.

The COURT. First, is there any particular advantage or is there any statute which says that the competition of four is better than the competition of two, or that the competition of six is better than the competition of three or four? That is No. 1.

No. 2: You seem to be under the impression and acting on the premises that a small company producing about 5 per cent or 10 per cent of the total consumption of a country is in an unequal position as compared with one which produces 50 per cent. Is there any evidence to support that, and I mean not only evidence in this 3762a record, but is there any economic history in this country or abroad which warrants an inference of that kind. The record in this case would tend to contradict that fact, because you do have these two companies which do seem to have a certain function. Also, I have not heard that either of them has gone bankrupt or was not enabled to compete effectively with the two large producers. Now, what about those two points?

3763 Mr. DIXON. First, to answer your first point, your Honor, there is to our knowledge no statute or yardstick, so to speak, that can be applied arbitrarily, as we view the situation. It is a matter of discretion to be exercised by the Court as to what it feels is essential and necessary to restore competitive conditions to this industry, and it is our view on that basis, based on what I have indicated, for example, is the aluminum situation, to get back to that for a moment, that effective competition requires certainly more than two companies in the business with the capacity of production.

The COURT. Is there anything in the statute or in any of the decisions which provides that a court may affirmatively establish conditions which will with reasonable assurance produce competition? My impression is at this moment that the statute and the cases simply reveal a

set of situations in which you remove obstacles which may exist in the path of competition. Those two things are not the same, and I thought that my opinion drew that distinction; that what the statute enjoins is the interposition of restraints on competition. But I did not understand that the statute ever imposed upon a court the duty of so rearranging business enterprises in this country so that the opportunity or actual condition of competition would exist.

3764 For instance, let us suppose the setup of these six corporations that you speak of. Is there anything in the law which would prevent any one of those corporations from acquiring the assets of one of the other of those corporations the day after the decree?

Mr. DIXON. Well, we have anticipated that possibility—

The COURT. But you mean that you may by judicial direction prohibit them from so doing?

Mr. DIXON. That is right.

The COURT. I say is there anything in the law today, assuming you have six going corporations, and presumably the six corporations which this court would establish would be genuine competitors, is there anything in the law which would prevent one of them from acquiring the assets of another of them the day after the decree was signed unless I, by further decree, say "You cannot do that which the law permits you to do"?

Mr. DIXON. Well, I think the Clayton Act on acquisitions—

The COURT. I thought that had been stopped. I used the word "assets."

Mr. DIXON. I see. Acquiring assets. Well, we would take the position, of course, that there would be no real difference between acquiring assets and acquiring
3765 stock where the practical effect is to acquire the business.

The COURT. That is right, but is there anything in the law which would make such a transaction illegal. In other words, let me put it this way: Assume you have a business in which six equal competitors are engaged in the field and each of them enjoys $16\frac{2}{3}$ per cent of the business; is there anything in the law today which prohibits one of those six from acquiring the assets and the business of another of those six?

Mr. DIXON. Perhaps not, your Honor.

The COURT. Would the Attorney General have a right

to say anything about it, or any court? Maybe the answer is yes, but my impression is the answer is no. I may be in error about that. I suppose you might drive my argument further and say no, and I might ask you, would one of the five be able to acquire one of the others, and we would possibly come to a point at which the statute would interpose a direction. Maybe that is the point where this Court ought to stop its decree. I am speaking now as a purely reflective matter, and I don't want you to get any impression I have formed any judgment on this.

Now it is true that in framing a decree you may sometimes prohibit the parties from doing that which the law permits them to do. I did that recently and the

3766 Supreme Court sustained me. I said in one case they could not make fair trade agreements, although the statute says they can do so, but I said they cannot do it for six months, which is very different from saying they never can do it. I do not think we can deprive citizens from doing what is given them by general law in perpetuity, although you might restrain them in order to permit the normal relationships to establish themselves. The reason I ask that question is to get you to work backward. If I cannot do it after that condition has been created, have I the power to create that condition?

But the more fundamental question which I first pressed upon you, has the court power to rearrange businesses in such a way as to create, affirmatively create, competition, or is the court's function limited to the elimination of obstacles to the opportunity to compete? Now manifestly these agreements are obstacles to the opportunity to compete and they should be stricken down. Maybe patents handled as they were handled in this case, might constitute obstacles to competition which should be put under some form of regulation over and above the regulation of the patent laws. But have we got to the point where an equity court has to authorize stock issues and formulate capital structures and arrange bond issues and stock issues and determine their relative amounts, 3767 and select boards of directors, and then, having created business entities, order them to go into the market and compete? That is the basic question which I don't say I know the answer to, and I want very much to be enlightened on it.

Mr. Dixon. Well, your Honor, that was what, for instance, we submitted the rather short, brief memorandum

which to our point of view sets forth the power and the discretion which the court had—

The COURT. In other words your answer is "Yes," an equity court does have that responsibility and that power?

Mr. DIXON. Yes.

The COURT. All right. Go to the next proposition and find it in the statute, as you are dealing with the anti-trust statute. I do not expect you to find it in the language of the statute, but can you find it in the decisions and call to my attention where the court has undertaken such a responsibility?

Mr. DIXON. Well, of course, the Standard Oil case that we point to probably can be cited as a case where there was not anything except a breakup of the combination. The corporations involved there were already in existence.

The COURT. That is right, just as we are breaking up a combination here which we found to exist between National Lead and du Pont. At least on the evidence here we made a finding that there was a connection and
3768 the decree proposes that that be severed. Nobody is going to argue why that should not be done.

Mr. DIXON. We would perhaps go further in direct application of the principle of the Standard Oil case which we feel states that the combination must be effectively dissolved by coming to the premise that it cannot be effectively dissolved without the relief which the Government requests be granted here being given to this industry. In other words, the power of concerted action, so as to speak—of course the restraints can be dissolved in the sense that contracts, as such, can be dissolved, or the parties can be enjoined from doing anything further pursuant thereto—but we feel that where you have a condition in the industry such as you have in the titanium pigment industry, where the record shows that restraints on production were imposed, and the defendants have been enabled thereby to reach a position in the industry such as the defendants have in this instance, that to the extent that it is practicable and possible for the court to do so, and in the exercise of its discretion it may, in order to, first, effectively dissolve the combination, and this would without any question dissolve them, and second, it would accomplish not only dissolution of the combination but it would create a condition in the industry where free competition would certainly be an unchallenged fact.

3769 The COURT. I do not dispute that. I have no doubt that, assuming that the corporations were launched, and that they did stay in business, and that they competed with each other, there would be competition. I do not dispute that. The question is whether that is what the court should direct. Here is what I want to know: I take it from your comment that there is no precise precedent in which a court has taken a corporation and split it in two, or in four, where that corporation had not illegally become the product of four or three or more units. That does not put you out of court. It may be there is no precedent, because the event has not occurred. You would be in worse shape if such events had occurred and the courts refused on principle to do it.

You may argue that proposition, or argue that as a matter of reason and logic the court should do it; therefore that takes you back to the question, is there any case which says that it is the function of the court to create competition rather than to create opportunity for competition, or to eliminate the obstacles to competition.

Mr. DIXON. Offhand I can give your Honor no such case. In other words, in that sense, we are here asking your Honor on the broad grounds of discretion, to exercise your discretion—

The COURT. You are dealing with a matter of 3770 relatively first impressions.

Mr. DIXON. That is right, and that is our position here on this matter. In the Hartford-Empire case, for example, which was a combination of more than two companies, the court finally said it would rather not try the actual dissolution or breaking up of those companies into separate groups, and so on, but it tried the other end—

The COURT. Did not the Supreme Court disapprove of its choice?

Mr. DIXON. No; I have not read it recently, but I thought they moderated the directions of the District Court.

Mr. WHITNEY. It never arose.

Mr. DIXON. The Government asked for clarification of the first ruling as to whether that precluded the trial court from ordering dissolution, and the matter is still, even in the memorandum opinion of the Supreme Court in the Hartford-Empire case, not entirely too clear on that point.

The COURT. We are dealing with a matter which is more or less in the field of general history rather than a field which is one of the mysteries reserved for lawyers. We know we have had big enterprises in this country.

Take the United Shoe Machinery situation which went through the courts, did the court say "Carve it up"? Undoubtedly if it had the United Shoe Machinery split in several units perhaps an enterprise which Mr. 3771 Justice Brandeis might have looked with favor upon, and perhaps if the decree said, "They shall never achieve a capital size more than a million dollars so as to keep the size down," you would have had more competition, but the Supreme Court did not do that. How about the United States Steel Corporation?

Mr. DIXON. Those decisions, of course, referring to Brother Whitney's remarks here, were made several years ago. What the present court would do with regard to the trend of economic matters—

The COURT. I don't know.

Mr. DIXON (continuing). The Supreme Court perhaps does not know.

Mr. WHITNEY. They decided the case last year. How can we presume to say as lawyers the Supreme Court did not know what it was saying and Mr. Dixon does not know, although it wrote two opinions in the last six months on the subject. We are now in cuckoo-land again. We have some opinions to analyze.

Mr. DIXON. Their recent case is, I suppose, one which my friend Mr. Whitney may be referring to.

Mr. WHITNEY. The Hartford-Empire.

Mr. DIXON. And of course the Hartford-Empire, which I am, of course, well aware of—

The COURT. Did the problem come up in the Associated Press case in any shape, manner or form?

3772 Mr. DIXON. Not definitely as yet.

The COURT. Did the Government ask that the Associated Press be broken into several competing units?

Mr. DIXON. No; that the membership and facilities be made available—

The COURT. That is comparable to your royalty situation, but that is not the same as saying, (a) that National Lead shall not remain in the titanium business, in effect, because you are telling them to create two corporations and sell the stock of those two corporations—or am I in error about it?

Mr. DIXON. No; that is correct.

The COURT. So you are saying National Lead shall discontinue, as far as it is concerned, the business of manufacturing titanium or selling titanium at all. Of

course that might be all right except isn't that pretty compelling in character?

Mr. Dixon. Of course, to answer the question of the Court on that particular phase of our relief, or requested relief, we are not of course contending, and I am sure your Honor understands, that National Lead cannot engage in business under the requested form of relief. We are asking the court that they divest themselves of the business.

The Court. Then they could start all over again?

3773 Mr. Dixon. That is right. In other words, they would be in the position where anyone else coming into this industry would be in at the present time.

The Court. In other words, theoretically, after they sold these two corporations they could then go back in business. I suppose you would not let them sell to a company which would not compete, which would not be unusual in the sale of a business of this character.

Mr. Dixon. No, not under those circumstances. But I wanted to make it clear, of course, that the relief which the Government requests here—

The Court. Does not contain such an expression of restraint?

Mr. Dixon. Yes, and we obviously would not ask for it and I don't want the impression to be created that we are trying to prevent National Lead from engaging in the business. What we are trying to do here is to assure competitive conditions for all in this industry and it might well be, perhaps, that a partial divestiture might accomplish that. This would still allow them part of their present business, providing it could be a completely separate unit. That is the problem and that is why we have asked for divestiture.

The Court. Let me ask this question. I gather from the decree there is more than one plant in the NL picture. What would you have done if they had concentrated their manufacturing all in one factory instead of more than one?

3774 Mr. Dixon. We would have an extremely more difficult problem than we have here, your Honor.

The Court. In other words, that would be a problem that would constitute a headache?

Mr. Dixon. That would be a problem, or your Honor would—I mean those facts—

The Court. I asked the question for a purpose. If we had to deal with a situation of that kind, it would as a

practical matter to some extent circumscribe the scope of action the court could take. Why should not we take advantage of circumstances which tend to solve the problem in part? Now for instance you do have four corporations, and assuming that we can recreate a full and free competition, untarnished in any respect, why should not we take advantage of that? If we had one corporation we would feel that we accomplished something quite noble if we split it in two. Now we have two. Why not be content with that, forgetting the fact that we also have two little ones? If we had one corporation and succeeded in splitting it into two big ones and two little ones we would really feel we had made history in antitrust law? I say that simply because I may not find a case in which a court accomplished any such thing by decree.

Now here you have a situation in which we find four corporations; two big ones and two little ones; why 3775 should not we say "Blessed be He for what we have." I don't intend to be facetious about that. I am serious about it.

Mr. DIXON. Well, to get back to the first question that your Honor suggested, supposing there were only one plant here, I mean supposing du Pont and National Lead just had the one plant, and the situation were such that it would be impracticable, or otherwise impossible, to do what we contend can be done here; that would be certainly a factor which your Honor should, and the Government would naturally expect would be considered and which we would take into consideration in determining what relief we feel the court should grant to make what your Honor has indicated should be done here to make this industry open at least to whoever wants to come into it.

Now if you had just the one plant I say we would have a problem here. Perhaps I would still be arguing, or may still be arguing, for complete divestiture, and I would have perhaps a much stronger argument assuming there is any merit to that contention at all, for complete divestiture, if that were the situation.

The COURT. Whom would you divest of what?

Mr. DIXON. We would divest National Lead—

The COURT. And du Pont of that plant?

Mr. DIXON. That is right.

The COURT. Then whom would you invest with it?

3776 Mr. DIXON. Whoever—

The COURT. So you would have another mono-

polist in lieu of the former monopolist. That might accomplish a fine and a criminal penalty but would it accomplish competition?

Mr. DIXON. As I said, you would have a situation there where, as a practical matter, we would have a problem of arguing a little something different from what we are arguing here.

The COURT. That is right, because the circumstances would be such as to dictate the choices you were to make.

Mr. DIXON. Correct.

The COURT. So why should not we take advantage of the circumstances here in making our choices? We have four corporations. Why should not we say "That is one of them. That is much better than if we only had one. It has solved one of our problems. That monolith has been broken into four; two big and two little ones. We do not know which is better. We do not know the optimum size for competition. Here we have an opportunity for genuine experimentation; two big ones and two little ones. All we want to make sure is that there is no deal inside here which would destroy the effectiveness of the competition and we want to make sure that in future the door shall not be closed as it was in the past, and we want 3777 to make opportunity free." But you go further and you say "Not only should we make opportunity free, but we should—I presume in the single plant situation you would say that in some way—we should direct the parties, or the United States to raise the capital to establish a competing business."

Now maybe that is what ought to be done, but has it ever been done? What does the Congress say? Has any court suggested that would be within the scope of a judicial decree? I do not think so. At least I don't remember any such instance.

Mr. DIXON. No. I think your Honor is correct, and I hope I am making it clear to your Honor, basing our request here for relief of the type requested, namely, divestiture, on the ground of the exercise of a discretion by the court for the purpose of making certain that effective competition will exist, and can exist in this industry, regardless of whether anyone else comes into it, and that is a question—

The COURT. Would you insert the word "reasonably" in front of the word "certain."

Mr. DIXON. That is right.

The COURT. Then you come to the problem of where should you stop. Clearly, if we had ten or twelve corporations, we might have more competition than if we had four or six. Yet you do not suggest formation of 3778 ten or twelve because you think that would be an unreasonable fragmentation of the situation we have here. Why is not four an adequate fragmentation, and why is six so much superior to four when you have the advantage that the four are available breathing institutions, whereas the six you would have a situation where at least four of them would be newly born institutions?

Mr. DIXON. Well, to take the question of just having the four corporations, that would be the situation we would be in if your Honor did not give even partial divestiture.

The COURT. That is right.

Mr. DIXON. You have the condition which I urged at the outset, of the two companies enjoying the position which they now enjoy, and this is a practical and not an academic matter in this industry—

The COURT. They enjoy strength and magnitude and power.

Mr. DIXON. That is right.

The COURT. But does it follow that little Virginia Chemical cannot effectively compete with big du Pont, assuming that it was under no obstacles? Is that the fact? I mean I do not know. I have not read any economists who say that such is the fact. I have read some professors who say that but I have not seen that. Isn't it true that little corporations efficiently managed can effectively compete with big corporations?

3779 Mr. DIXON. Well, of course the Government is urging the position of small business.

The COURT. Don't forget as far as the Government is concerned, we are not concerned with whether they can make as much money as big ones. That is not the purpose of the Antitrust Law. It is a consumer statute, isn't it?

Mr. DIXON. Right.

The COURT. At least in part a consumer statute. Is there anything to indicate the consumer cannot get at least as efficient service out of the little corporations as well as the big ones?

Mr. DIXON. We have here in the record, of course, the experience of Zirconium with the limited production.

The COURT. Is Zirconium today out of the business?

Mr. DIXON. Well, they are in business.

The COURT. They are still manufacturing pure TiO_2 !

Mr. DIXON. Yes.

The COURT. Under what? du Pont license?

Mr. DIXON. That is right.

Mr. WHITNEY. I think Mr. Dixon ought to tell your Honor, if he knows it, that the American Zirconium Company has bought a plant and is engaged in going into the business.

The COURT. In going into it? I thought they were.

Mr. WHITNEY. Not going into it, but on a larger scale expanding the business.

3780 Mr. WHITNEY. He might at the same time tell your Honor the record shows it is not the "little Virginia Chemical" but a division of the American Cyanamid Company and the War Production Board has authorized it to increase its business to three times the present size. If we are going into those facts let us try those facts. They happen to be completely diverting from the discussion that is going forward because unfortunately those companies are growing so rapidly that we won't have the benefit of these little businesses Mr. Dixon is hoping to install.

The COURT. I suppose "little" in any context is a variable as to size. In this context in the presence of NL and TF, Zirconium and Virginia Chemical were little. Of course, I was aware of the fact that all of them had assets of parents which are large.

Mr. WHITNEY. I am afraid the fact is they are not little in the context of National Lead and du Pont. They were in the business with plants all the way from the winter of 1936, '7, '8 and '9 up to the beginning of the war.

The COURT. It may be partly due to what is happening here, I don't know.

Mr. WHITNEY. The decree will be operating in the future.

The COURT. What I am trying to get at, if we are going to have a check-up that will limit size, as such,
3781 maybe the Congress should do that directly and not have equity courts determining what the optimum size should be for a competing business. I don't know the solution. I do not know that the courts are qualified to find the answer to it.

Mr. DIXON. Our position can be briefly summarized, your Honor, in the premise that your Honor has discretion to do what we have indicated and what we have asked you to do, and the reason we are asking it is because of two things, first, we feel that it is necessary to effectively—

effectively is the word I am emphasizing—dissolve this combination; second, that it is necessary in order to create an atmosphere here, if you want to use an extremely vague term, which will be susceptible to the exercise of free competition in this industry. Now if I am wrong in my premise, then your Honor is correct and you should grant no type of divestiture.

The COURT. I cannot be correct because I have not even stated a fact. I am only asking questions, and you must not arrive at the conclusion I have expressed a view. Even when I use declaratory sentences they are still questions.

Mr. DIXON. As I said, this is a practical matter and the Government has found from experience, and probably Mr. Whitney would say that if something we ought to offer evidence on, and perhaps if your Honor feels we ought to have that we can do it, that new capital, as such—we feel that that is essential here—will not venture into an 3782 industry where there is such a tremendous gap between the production capacity and the knowledge and everything else of the industry as exists here between the two defendants and the other two companies that it is true are in the business, and they are now making efforts to expand, and so is du Pont and National Lead, so whatever they may be able to take up, the gap will still exist and the competitive disadvantage, assuming now production capacity, gives them something on the competitive end, and we think that is sound, if we get into a question of costs why I think we could show that the greater the production the lower the cost.

The COURT. Within limits.

Mr. DIXON. Within limits, yes. And the defendants, unless there is a severance of part of their capacity, at least to a point where there will be something akin to equality of production would not enable, theoretically at least, the smaller companies to compete on a cost basis and we contend that the condition which exists here in this industry, which we know exists, as the result of this combination—

Mr. WHITNEY. Your Honor, surely that is not supported in the record. These are mere statements.

The COURT. Let him go on. You will be given an opportunity.

Mr. WHITNEY. I have to interpose an objection to the introduction of the evidence at the moment it is introduced.

3783 THE COURT. No evidence is being introduced.

MR. WHITNEY. But my friend is saying what he knows about this industry and which he confesses is not in the record. Surely there is some limit to oral argument.

THE COURT. Yes, there is.

MR. WHITNEY. And it has to do with the record, does it not?

THE COURT. Your objection is noted.

MR. WHITNEY. That is all I asked. That is very important, that you know it as it goes along because vice leads to vice.

MR. DIXON (continuing). Is to enable these companies to continue to be and to have a distinct competitive advantage over not only the present companies but anyone else that might come into the industry.

We realize as a practical matter there are bound to be some competitive disadvantages. We do not expect to equalize them, but we are asking the Court to do, again within the exercise of what we feel is its discretion, and certainly under the cases we view he has the authority to do it, by making, for example, a partial divestiture that would make certain that even the two companies would not be at whatever competitive disadvantage there may be, by reason of their present capacity as compared with the present capacity of the two companies, and, of course, when you have competition cost is a matter of extreme importance in this industry as in any other industry—cost of production. And while we may dissolve the contracts, if we leave National Lead and du Pont in a position where with their present capacity they are able to produce at 8 cents, or whatever their cost may be, by reason of the advantages of their present capacity over the other companies, certainly that is a factor which, in our opinion, enters into a determination of the question of whether you are going to have effective relief or whether we are just going to have something here on paper which, while it dissolves the contracts, leaves the parties where they are, which position they reached because of this combination.

Now of course the defendants would argue to give what we ask is to penalize them. In other words, the Court is exacting a penalty of these companies by requiring them to divest themselves of either all or part of their plants. Now it is not a penalty as we view it. The purpose of it is to accomplish what we have sug-

gested should be accomplished and what we think the facts and the record here shows can only be accomplished providing you have those competitive disadvantages minimized insofar as it is possible to do so, and by any order that this Court may enter.

Now there are still going to be some disadvantages competitively speaking, even if your Honor were to
3785 do as we have suggested, but they are brought closer together where we are in a position to have what is akin to real competition from the point of view of the ability to compete of those companies. Now you may have four companies in the business. That does not necessarily mean that you are going to have effective competition.

The COURT. It does not. You might have twelve and still not have effective competition.

Mr. DIXON. Yes, but all we are asking the Court to do is, even with the four companies, put them in a position where they will be on as nearly an equal basis from the point of view of the ability to compete as is possible for this court to do, and then the newcomers that care to come in the industry will know they are not going into an industry that National Lead, having a capacity of 70,000 tons and du Pont 50,000, have the advantage, but at least they will have some fair chance if they want to construct a plant of 20,000 tons to get the benefit of that quantity production in their price costs.

The COURT. Is there any historical evidence to support the proposition that when two companies occupy a very important segment of the field that similar companies hesitate to enter it?

Mr. DIXON. Well, that is the experience, as I said, that the War Plants Division of the Government is
3786 finding at the present time with the aluminum industry, to go back to that, which is more nearly comparable.

The COURT. You are speaking still of little giants.

Mr. DIXON. That is right.

The COURT. Suppose you accomplish your purpose. You split these companies up in the way you suggest and then du Pont is out of the business, and let us suppose that Standard Oil acquires one of those companies and the other company is acquired by a new outgrowth of small private entrepreneurs. Standard Oil has a large chemical division, and great big laboratories and so on, and unlimited sources of capital, and pretty soon it has

extended its competitive capacity to three or four times its present size and it then occupies eighty or ninety per cent of the field. Is there anything you could do about it under the law?

Mr. DIXON. I think definitely there should be something.

The COURT. What?

Mr. DIXON. If the business reached a point where Standard Oil Company controlled ninety per cent of the business, that, standing alone, would not necessarily be an evil. It would be very persuasive evidence.

The COURT. Just let us suppose you had furious competition. I am assuming that the five other companies that will emerge out of this reorganization would be of Simon pure character and all be staffed by ex-officers of the Department of Justice with an eye single to the preservation of the pure competitive system. Now nevertheless Standard Oil has tremendous capacity and it achieves a condition of eighty per cent of the industry. Is there anything you can do about it under the law as it presently stands.

Mr. DIXON. I would say no, your Honor.

The COURT. Doesn't it follow then if you say Standard Oil can be getting away with it, if you say to du Pont, you cannot do it today, that you are penalizing du Pont?

Mr. DIXON. No, it does not seem to us that you are penalizing it.

The COURT. What I mean by penalizing, you are prohibiting it from doing something which all other citizens may do—only in that sense.

Mr. DIXON. As I said, we are not asking the Court to decree that duPont cannot engage in this business.

The COURT. But you do not let them go up to eighty per cent, or would you let them go up to eighty per cent?

Mr. DIXON. Yes. For example, your Honor, let me make our position clear; we are asking merely that the Court order what the government feels will put this industry at the present time, when it is accomplished on a basis where free competition will be assured to the country.

3788 The COURT. You want to start them off right.

Mr. DIXON. That is right. They have never had a chance, in other words.

The COURT. What about these four you create. They all start even but finally four of them control one hundred per cent of the business and a new fellow wants to come in, isn't he up against the same situation? Or do

you think there is some virtue in having four competitors rather than three or two?

Mr. DIXON. No. To answer your question, the Government is not interested nor concerned about the number of companies then in the business providing they have reached their position in the business by and through the exercise of what is commonly known as whatever they have in the free competitive system. If, however, any one of them had reached that position by indulging in practices which were in restraint of trade, the Government would very definitely, say five years from now if that were the situation, think that that was a condition to be dealt with.

The COURT. Well, of course, if they had engaged in practices in violation of the statute, and regardless of whether they succeeded in obtaining any position thereby, you would want to stop the practice.

Mr. DIXON. That is right.

The COURT. So it is not the attainment of the
3789 status that is the objective but the engagement in certain practices.

Mr. DIXON. That is right.

The COURT. You have a very difficult problem. I do not know the answer. I assume you are going to resume after lunch and talk about the European situation? Or are you not going to talk about it?

Mr. DIXON. We are not going to say much about it unless your Honor wants to hear our position as to the relations—

The COURT. I am troubled about how you are going to get the Europeans to import into the United States as against a tariff provision. That is number one. I also want to know how you are going to get National Lead and duPont to sell abroad since you are not suggesting that I do anything about British, German and Japanese patents.

Mr. DIXON. We have asked there on the patent angle a licensing of those patents so that whoever desires to use them will have the right to those foreign patents so they will have the right to utilize them if they care.

The COURT. But you are not going to give any American producer any BTP patents?

Mr. DIXON. No.

The COURT. You cannot do that.

Mr. DIXON. No.

3790 The COURT. So to the extent that the Frenchmen and Germans and British have the patents, the

Americans are still going to be at a disadvantage in exporting to those countries, and vice versa?

Mr. DIXON. That is right.

The COURT. We will take a recess now until two-fifteen p. m.

(Recess until 2:15 p. m.)

AFTERNOON SESSION

Mr. DIXON. I believe we were about to discuss, when we adjourned, the question of the relief requested by the Government as to the foreign patents involved in this proceeding, and as is indicated in the proposed decree, paragraph 10, your Honor will note that we are asking that the defendants be required to make available to all persons who desire to use them, the foreign patents under the control of or owned by the defendants.

Now here again we have a practical question and a practical problem as to what the Court can do to open up foreign commerce to this industry in view of the conditions found by the Court to exist. We feel that this is as far as the Court could go, by making the foreign patents owned or controlled by the defendants available to American users, to the extent possible. That will at least enable them to sell in the foreign markets the products manufactured under or arising out of the use of those patents.

Of course there is no way of forcing competition, by either forcing the defendants or any other company to sell in the foreign markets, or the co-conspirators to sell in the American market, and that again is another one of the reasons why we have asked for the type of relief that we have asked the Court to grant in this case. We feel that it is all an essential part of and necessary to the creation of free enterprise and free competition in this country.

Now on the patent questions generally, or the question rather of licensing of the patents involved in this industry, your Honor will note that we are asking in the proposed decree for compulsory royalty-free licensing. I am frank to say that that request was made for the purpose only of preserving the rights of the Government upon that question.

The COURT. In view of the Hartford case?

Mr. DIXON. That is right. We recognize the status of the law on that question and the present ruling of the Supreme Court by a 4-to-2 decision, now a 3-to-2 decision,

on that question. However, insofar as it relates to the question of relief, it is perhaps another form of divestiture.

Mr. WHITNEY. Allow me to point out that the 3792 Standard Oil case, which you cited this morning, never existed at all because it is a nothing to nothing decision under this philosophy.

Mr. DIXON. At least I think the Judges are still in position to pass upon the question. I recognize Mr. Whitney's distinction but I think it perhaps may not have as much merit as most of his arguments usually have.

However, as I indicated, it seemed to us that bearing the Hartford-Empire case in mind, where the Government had asked for divestiture and the court had seen fit to defer that question giving royalty-free licensing until it could determine whether that was adequate to restore free competition to that industry, that as I stated, recognizes that in asking here for divestiture.

The COURT. Plus royalty?

Mr. DIXON. Plus royalty; our requests for relief are in the alternative. I mean I do not want the Court to understand that should it feel that it would be willing to grant some form of royalty-free licensing, that it would necessarily be the position of the Government that we would also require, in addition thereto, or ask the Court for, complete divestiture under paragraph 9 of the decree.

Now on the royalty-free requirements we do feel that in considering that as the requisite form of relief that the Court may see fit to do what it did in the 3793 Vehicular case where the Court was frank, in its supplemental opinion, to recognize that question as having been passed on by the Supreme Court in the Hartford case and holding that it would nevertheless, within the exercise of its discretion and within its jurisdiction, grant royalty-free licensing for a period of time until and upon the showing that conditions in the industry no longer required that type of relief.

In other words it was not, as was the original relief granted in the Hartford case, an out and out grant of patents on a royalty-free basis; it was, as Judge Leahy indicated in his supplemental opinion in the Vehicular case, granted until such time as a showing could be made that it was no longer essential to the restoring of a condition of free competition in that particular industry. So as I indicated, we are making these requests in the alternative and feel that some form of royalty-free licensing,

as laid down in the Vehicular Conveyance case, may well be granted by the court, and, in the alternative, some form of divestiture, either complete or partial, and if a preference were to be requested by the court it would be the request of the Government that some form of divestiture be granted for the reasons urged in the argument this morning, that the competitive disadvantages on the greater capacity to produce are, as we see this case and this industry, determinative of our reasoning for that type of relief.

3794 We have in addition to that asked for compulsory know-how or granting of technical information to the two companies now in the industry and such other companies as may in the future come into this industry, so that the disadvantage which would otherwise exist, and the preferred position which the defendants enjoy at the present time by reason of the exchange and of the combination, would be dissipated to the extent that it is possible by this court to make those instrumentalities of the combination available to other companies in the industry or anyone else who might desire to come into the industry.

So that, in substance, as your Honor indicated this morning, the Government is asking here, in order that there may be what we feel is effective relief to this industry the form of divestiture, either partial or complete, as requested in paragraph 9, or some form of royalty-free licensing of the patents to the industry within the limits as specified by Judge Leahy in the Vehicular Conveyance opinion, or possibly both; second, compulsory know-how, or technical information, available to anyone in the industry, or desiring to enter the industry.

The COURT. And not limited to the know-how related to the patents?

Mr. Dixon. That is right. As your Honor knows, the record is replete with the fact that plant visits and
3795 that sort of thing—

The COURT. All I wanted to know is, your proposal was not limited to the patents.

Mr. Dixon. That is right, your Honor. And as to those patents which have not yet issued, or as to which the defendants may acquire title within a period of five years from the decree, we are asking comparable treatment as to those patents, except that on those the court may fix a reasonable royalty in the event the licensees or parties who desire the use of those patents, are unable to determine or come to some agreement on the royalty

itself; in other words, those to be licensed upon that reasonable royalty basis.

I think that, in substance, covers the principal requests—

The COURT. How about the sale of the foreign stocks?

Mr. DIXON. Well, that we feel is essential and necessary to complete divestment by National Lead from the co-conspirators who are not within the jurisdiction of the court. The problem there in any event is a most difficult one and where the co-conspirators are before this court the relief would not be so difficult. But certainly insofar as this court can go in cutting the knot and the tie to the co-conspirator not within the jurisdiction of this court, we feel that the only way that that can be done is to require the defendants having those interests to completely divest themselves of those interests within a period of time and on such terms as may be prescribed by the parties and approved by the court.

The COURT. You have no objection to the American producers engaging in foreign production?

Mr. DIXON. No, we have not, your Honor.

The COURT. Through subsidiaries?

Mr. DIXON. That is right.

The COURT. So assuming that National Lead sold its interest in BTP, you would have no objection to National Lead then acquiring a British manufacturing company?

Mr. DIXON. A British manufacturing company?

The COURT. Yes.

Mr. DIXON. No.

The COURT. Well, would you have objection to its reacquiring BTP?

Mr. DIXON. Well, yes, very definitely. I mean that is why we have prescribed in the next, I believe, to the last paragraph of our decree we would construe that action as one which would tend to recreate the very condition which this court has found to be illegal.

The COURT. Of course where you have a parent-sub-sidiary situation, complete parent-sub-sidiary situation, you do not have a problem of restraint of trade, do you?

3797. Mr. DIXON. You mean where it is one hundred per cent owned?

The COURT. Assuming that National Lead owned BTP one hundred per cent, there would be no violation of law in BTP agreeing not to compete with its parent.

Mr. DIXON. That is right. That, in substance, your Honor, sets forth the position of the Government as to the relief which we submit is necessary to accomplish the throwing open of this industry to a system where you will have, in fact, free competition.

The COURT. Have you considered the proposed revision of the agreements between National Lead and the British or Europeans?

Mr. DIXON. We feel, your Honor, that those agreements in and of themselves must be completely stricken from any consideration that the court will give here to the relief to be ultimately granted.

The COURT. I have not read those agreements, or if I have I have probably forgotten them, but anyway, you do not think they accomplish the degree of severance which you think should exist?

Mr. DIXON. Definitely not. As a matter of fact your Honor may recall, and as I said, the problem here, assuming that is done, is still going to be a most difficult one to establish a condition in fact where there may 3798 be competition, but through the course of Dr.

Jebsen's testimony I think your Honor asked him the question as to what extent those relationships would be ignored by the companies even assuming there was complete severance by stock ownership, and as I recall it, I think Dr. Jebsen said something to the effect that the personal equation the court would realize is something hard to evaluate and eliminate.

The COURT. That is right.

Mr. DIXON. For that reason we are asking, to the extent it is possible to do so, that that cord be completely cut and even with the complete severance of that cord the condition will still, at least in our opinion, be anything but one in which there is liable to be fruitful competition arising by the present companies engaged in the business, but the problem is a practical one and to the extent we can sever that cord and impose other restrictions on the resumption of those relationships that we wish to do everything possible to accomplish that purpose in effectively dissolving the combination.

The COURT. Do you suppose its holdings in Titan Gesellschaft is salable?

Mr. DIXON. I have not been informed, your Honor, as to just what the present status of those stockholdings are. I would assume that there would be several factors to take

into consideration there, namely, the question first, 3799 as to whether that company is still in existence as one which could produce, and, second, whether there is anything salable, and, third, what will be the future policy of the Allied Powers with regard to not only this particular interest—

Mr. WEBSTER. If I may—

The COURT. Maybe they will be producing titanium on the Volga.

Mr. DIXON. It might well be, Judge, if they continue the present method, apparently, of taking reparations from Germany, it might well be that TG's plant will wind up somewhere in the Russian territory.

Mr. WEBSTER. If the Court please, when we received the Government's requested decree, we were really so astonished that we thought we would have to reread the Court's opinion to find out if there was anything in that opinion or in the findings that would justify any such relief as the proposed decree seemed to foreshadow.

The COURT. That is an ordeal you do not want to be subjected to.

Mr. WEBSTER. But we did look again, at least by process of reading, and we found that we had a case in which National Lead Company had entered into agreements found by the court to be illegal to divide the world into fields and imposed restrictions on the use of patents and on the use of products manufactured under patents. We 3800 do not find anything in the opinion which indicates that the Lead Company has ever made any improper acquisitions. We did not find any mergers or combinations or unions of any kind which might be criticized, or indeed which had been criticized, in the pleadings. We did not find any of the features of a case in which divestiture has heretofore been requested by the Government. What we found was a case of agreements and we assumed from what the court said in the opinion that it would expect those agreements to be effectively terminated for all purposes and for all time.

At the conclusion of the opinion in the next to the last paragraph,—the last paragraph was one for which Mr. Dixon and Mr. Whitney and the rest of us I am sure are very grateful for your Honor's generous recognition—in the next to the last paragraph that the Government shall submit an order to give effect to the Sherman Act, and plaintiff is entitled to a decree which will restore titanium to free competition. The means of preventing such a de-

velopment must be provided and the power to prevent it must be shorn from those who by combination have acquired it.

The COURT. You did not find any language there which says "and the Government with the aid of the court must establish competitive units of business"?

Mr. WEBSTER. No, we did not, your Honor. In fact the Government's first seven paragraphs seem in general 3801 to be so appropriate to carrying out what your Honor foreshadowed in that paragraph that we could scarcely believe that the divestiture provision had been seriously proposed. It seemed to be an addition which was thrown in here as a sort of trial balloon to see what would happen to it.

Now the first seven paragraphs, as I indicated this morning, subject to some clarification, are acceptable as being appropriate to the kind of decree which we believe this opinion indicates the court will make. In the first place, that part of the decree will terminate the 1920 agreements. It will terminate the assumption agreements under which National Lead became a party to the 1920 agreement. It will terminate the 1933 agreement with du Pont. It will terminate the agreement with IG, with reference to TG. It will terminate the British agreements.

The COURT. Or at least it will disable you from performing under them.

Mr. WEBSTER. It will terminate, so far as we are concerned, the Canadian agreements. I may say, in parenthesis, it goes even further because it proposes to terminate agreements made between European companies, namely the Agreement of Four and the Agreement of Six and Agreement of Deliveries, simply on the basis, I assume, that TINC was a party to those agreements. Just 3802 how the court can effectively terminate an agreement made and performable and performed in Europe is, I find, philosophically difficult.

The COURT. You say the most it can do is prohibit TINC from performing.

Mr. WEBSTER. Certainly it can prohibit TINC from performing under those agreements.

The COURT. And it would be up to TINC to stay out of this country so it would not—

Mr. WEBSTER. It puts TINC in peril of what may be done in the future. I don't think the risk is a vast one. I think your Honor's question as to what might happen

to TG and TG stock in the future, presents a condition which TINC may get some benefit from if at any time an attempt is made to enforce those agreements which I think is really academic.

The COURT. As a practical matter?

Mr. WEBSTER. As a practical matter. Now we would have liked your Honor to approve that proposed British agreement which was really a modification agreement and by its terms cancelled the old British patent licensing agreement but left the British 1933 agreements in force for certain limited purposes because of the contractual right, but this decree, as proposed by the Government, will terminate those British agreements and we will then have to see what we can do to salvage the stock in the British company.

Now to go on to the next phase of the decree, 3803 which seems to us in general an appropriate provision, is you have complete compulsory licensing of the patents, so far as this court can provide.

The COURT. Of all existing patents.

Mr. WEBSTER. Of all existing patents.

The COURT. Controlling the licensing for a period of five years thereafter.

Mr. WEBSTER. That is correct. Now we took it for granted that the court would require effective licensing and indeed if the court will adopt a suggestion for clarification which we propose to offer, it will go beyond what the Government has suggested. It will require reciprocal cross-licensing. To spell that out, if the American Cyanamid requests the du Pont Company and the National Lead Company to give it licenses under all of their patents, it would be required to give du Pont and the National Lead licenses under its titanium patents. We think that is essential and we think it is consistent with the spirit of relinquishment of restraints on patents.

Now we also would go beyond what the Government suggests in another respect: We would urge the Court to enable the du Pont Company and the National Lead Company to continue to cross-license each other under these patents. Strangely enough, the purpose of this case,

3804 which in part was to strike down an agreement between the du Pont Company and the National Lead

Company in the terms now suggested by the Government, would forbid the execution of patent licensing agreements in the future between the du Pont Company and the National Lead Company which we believe would

create a situation not in harmony with freedom of trade and freedom of the use of patents, but inconsistent with that. In other words, if we are to have patent licensing we want complete unfettered unrestricted patent licensing. But as I say, we are prepared to acquiesce in a decree which will require us to grant licenses under patents taken out within the next five years.

Now again to discuss for a moment those provisions which are intended to create a condition in harmony with the law and to shear us of the right to prevent a development of a plan, development of a condition, consistent with the law, we think the know-how provision is appropriate and we would expect to have a decree in which we would be required to give know-how necessary to put to use patents that are licensed by our company. We think the Government's suggested provision goes far beyond that; that it would require us to become a sort of nursemaid, teaching the manufacturing skills, technological skills that are not related to the use of patents that would put us into their manufacturing business and that would lead to all kinds of controversy and disorder.

3805 The Court. Isn't your suggestion, theoretically at least, equal to zero, because I was under the impression that a patent to be good, meaning valid, must sufficiently disclose the art so one skilled in the art could practice it without further instruction?

Mr. WEBSTER. Your Honor, that is, a very interesting observation because we have just been discussing that very point together during the noon hour and Mr. Williamson made, at one point, substantially the same observation that your Honor has now made. We think that theoretically a chemist as skilled as the chemist who made the invention, and applied for the patent, or one perhaps who was capable of becoming as skilled as that, would be able to take a series of patents and put them into use. On the other hand, as a practical matter, the know-how that we are talking about is the know-how that would enable a concern or a group of chemists not familiar with the manufacture under patents of titanium pigments, to put the patents into operation as a group to get started in the manufacturing business under the patents, and we think that is as far as it ought to go. We think it is difficult to define exactly what that is, but we are willing to take any amount of trouble to try to do that. We think that the line between that, and as I say, serving as a kind of wet nurse

to the X Company's chemist or the Cyanamid Company or the Sherwin-Williams Company or the Pittsburgh Plate Glass Company or the Zinc Company for a period in perpetuity, or during the life of the patents, is very impractical and very unwise and an unnecessary provision. Indeed, we think it is confiscatory so far as it requires us to devote our technical organization to the solution of the technological problems of those companies.

Now having said that which I have, I think it shows that it is our desire to work out a decree honestly in harmony with the law which will involve a complete dissolution of the combination under attack in this case; namely, the combination between the National Lead Company and its foreign associates, and between the National Lead Company and the du Pont Company. Having said that, I think it is almost unnecessary to say that we are not prepared to accept any provision which goes beyond the reasonable necessities of the case which was tried here. Indeed, if I may suggest again parenthetically, if it should develop conceivably that that issue, or those issues, should be gone into, we have notes which indicate that a case tried on those issues even if properly pleaded, would take a long period of time. There are many issues together with the acquisition and use of these properties and the uses to which they could be put in the future which would have to be explored, which would have to be determined by the court. I think we are far from needing to go into anything of that kind because with the authority of my friend and colleague, Mr. Handler, beside me and the vehement statements of my gifted friend, Bill Whitney, behind me, there is no case in which dissolution or divestiture has been required where the acquisition of the properties has not itself been illegal. I think that was fully developed, and my friend, Mr. Dixon, conceded that when your Honor pressed him somewhat on the point. What he would do, however, would be to ask your Honor as a matter of discretion to go far beyond what any other judge as a matter of discretion has been willing to do.

The Court. You would call it indiscretion.

Mr. WEBSTER. In fact, even in cases where divestiture was regarded and under the pleadings and trial of the case might be regarded as appropriate; namely, the Can Company case, and the Hartford-Empire case, the Towing Company case cited in our memorandum, the courts have declined to exercise their discretion under those circum-

stances to require a divestiture where they thought a condition in harmony with the law could be brought about or restored without dissolution, so that you not only have a situation in which no measure of dissolution is appropriate under the existing statutory and case law, but you have a situation in which even if it were appropriate
3809 we should argue under the facts of this case that the discretion should not be exercised.

Now I submit to your Honor a fortiori that the only basis on which the Government comes to you for this form of relief is on the basis that they want your Honor to go way out beyond anything that has ever been done before. They are asking your Honor a very unreasonable thing.

I am not going as far as my friend Whitney in saying that the point is exactly jurisdictional, but I think it is very highly discretionary, and that any exercise of discretion in that direction would certainly be excessive.

I would just like to go back a moment and take advantage of the remark made by Mr. Dixon. He spoke of this as a young industry, as a coming business. He spoke of the capacity of other companies. He used optimistic phrases, indicating what is in fact the case, that the industry is a flourishing industry. It is an industry in which the demand for pigments exceeds the capacity for production; it is an industry in which the opportunities to go into the business if the restrictions are removed are enormous, and it is an industry in which there are any number of companies with vast chemical technical know-how ready to enter into it the moment that this court's decree becomes effective, and Mr. Dixon knows that, and I say in frankness he should say so to your Honor, and I think he did say so when he said it is a coming business; it is a growing business, and so forth.

3810 Now I would like to say just a word about the foreign investments. It is no secret to any of us that as to the foreign interests, that that has been a source of concern and embarrassment and difficulty all the way through the trial and before the trial, and counsel were eager to do something to bring about a satisfactory condition. Of course, in the case of TAS, we own one hundred per cent of TAS, and, as your Honor now appreciates, TAS is no longer a manufacturing company: it is a sales company that also holds stock in a mining company in Norway. We own most of the stock of SIT, the French sales company. The remainder is held by small private interests and firms, and it seems to me that with reference

to those companies nothing should be done.

With reference to the German company and the Japanese company, which fall into a different class, Mr. Dixon and your Honor know quite as much about those as we do. All we know is what we see in the papers.

The COURT. Mr. Whitney might know more.

Mr. WEBSTER. They have been largely destroyed. The plants in the case of the German company are in the hands of the British Occupation Forces. The plants in the case of the Japanese company are presumably in General 3811 MacArthur's hands, and I believe within the last few days he has taken over all of the economic interests of the entire country, including those of the Emperor.

Nobody knows what those stocks are worth, or whether they can ever be sold, or whether there is anything to sell. So really, we come down to talking about just two major interests and no more.

The COURT. British and Canadian.

Mr. WEBSTER. British and Canadian, BTP and CTP. Our suggestion in that proposed agreement was that we reduce our interest in the British company from approximately 50 per cent, though we actually own 44 per cent, and it might be said that we control an additional 5 per cent held by Greef, making 49 per cent. Our suggestion in the proposed agreement was that that be further reduced so that the interest of the Lead Company would be equal to the interest of ICI, ISC and GW, and then there would be a 25 per cent interest given to each of the companies set forth in the proposed agreement, which would then remove all of the restrictions of all sorts, and let nature take its course. We think that is a practical arrangement.

We believe that in the present condition of our economic relations there should be a tolerance of that character for an effective American investment, and, that we should not be required because of some quixotic applica- 3812 tion of the antitrust laws to foreign trade, to give up an investment just at the moment when the investment is beginning to look as if it had some real value, and then turn around and buy another company, or to try to buy competitive companies that I think would be very reluctant today to sell out to us, or finally to completely nationalize the National Lead Company and just stay within the confines of the United States and not to have to go out.

Maybe that is the thing to do, but I do not think it is a good thing from the standpoint of public interest, and I believe the same considerations apply to CTP.

Unless my colleagues have something they want me very much to add or perhaps modify what I have already said, I think that is all that need to be said by us, your Honor.

Mr. WHITNEY. If your Honor please, I may take a little more time than is necessary, but that won't be a new proceeding on my part. I feel that the case means so much that I know your Honor will permit, if necessary, a little more time, so that I may be sure that I put before your Honor all the thoughts that we think are material even if your Honor is already in possession of them by independent thinking.

Now I should like to begin with a five-minute review of the case as such. This is a lawsuit in which the plaintiff very properly under modern professional motions announced to the public that it is bringing a test case on international cartels. This was, as the phrase was used by one of the Assistant Attorney Generals whose name is on the brief, a textbook International Cartel to lay before the Court for a ruling thereon. Now to come from publicity to pleadings, the complaint was consistent therewith. I referred to it this morning, and there is no need to go into it at greater length. It is a complaint throughout which presents an issue as to an international combination and the existence thereof, an international combination based principally upon agreements as to patents, and therefore appropriately enough, it fell within a branch of the antitrust division of the Department of Justice that I believe was called the Patents and Cartel Division, and our friend, Mr. Berman and I had the pleasure of arguing the last case in the Supreme Court against each other, and he was put in charge of the division, and one of his most talented confreres, Mr. Dixon, has been with us from the first.

3814 Now, the case was a patent and international case. That is the case that the public was told about; it is the case that was pleaded, and it is the case that was tried and we can't have read the 1400-odd exhibits as we had to do or heard the speeches we had from the first moment without being aware of the obvious, and that I submit to your Honor governs the situation.

When the time came when we were at the end of the case and where we have the decision of your Honor, and

that is, of course, what governs us today, and whatever is in the decision we take as true for the purposes, of course, of this argument——

The COURT. Pro tem, anyway.

Mr. WHITNEY. Yes, sir. I just want to refer to three paragraphs of that.

At the bottom of page 59 is the only place that I can find in which your Honor made a finding, and it was in general language, to give National Lead and du Pont together domination and control over the titanium pigment business in the United States. I take it that the word "together" was an added word of art and represents when you add them severally, together. And your Honor found that that was the necessary effect of the agreement, Exhibit E, and of the du Pont assurances, and when you came to the final generic findings of fact you introduced them in paragraph 95 by saying, "The agreements and understandings entered into between the defendants 3815 and the other corporations herein named in finding 1 have had the following necessary effects, and I think the whole point in the decree that such evils as there are were found to be the necessary effects of certain agreements from which it follows under the principles of cause and effect can survive, for the way to dispose of the effect is to remove the cause; hence, to strike down the agreements, otherwise the findings are made meaningless and the evils are said to result from something other than the agreements, but that is not so.

Now the second point in the finding is that the principal paragraph relating to the domestic business, which, of course, was a minor and collateral incident in the case, is paragraph 78 at pages 57 and 8 of the print. And your Honor found that there was active competition between National Lead and du Pont.

Now I don't press these findings because I am going to hoist anyone with them. I am profoundly convinced that the evidence supports them. Mr. Daly answered on examination—I have forgotten whether it was direct or cross—that the competition with National Lead was plenty tough. The competition of Virginia Chemical and Zirconium likewise was, and then your Honor refers to the sales and repeated reductions in price, and finally you found that there was no selection of territorial customers, and under that thought business identity is the product of agreement or collusion.

3816 Now, in my brief experience if we were to go to the Supreme Court in this case from whatever decree was given, or if the Government were to go, there would be a heavy preponderance in favor of your Honor's findings, and the chance of any of us reversing any of the findings would be very small.

The findings are, if I may be allowed to say so to your Honor, reasoned findings and carefully reached findings, and the tendency of the Court would be to look at them and say, "What are the facts of this case?" Well, the classic instances of antitrust violations are, agreement upon price, division of territory and limitation of production.

Finding 78 answers that those are not present in the case. I think that would have a profound effect on the Court in passing upon the decree.

Now, the third point that I would like to call your Honor's attention to is that when it comes to the specific finding as to the Zirconium and Virginia Chemical, paragraphs 84 and 85 on pages 63 and 5, your Honor finds that the evidence does not warrant the inference that the licenses granted were pursuant to a common plan between National Lead and du Pont. Now, in other words, this comes for disposition as a case in which there have not been those agreements and practices in restraint of domestic trade which are characteristic of the typical combination between two or more seeking to restrain

3817 domestic trade except in that special class of case of which this is one where domestic trade is found to have been restrained by patent license agreements and those alone, and to the extent of that and to the unlawful clauses therein. For example, the quantity limitations. Therefore, it is a patent license case as far as we are concerned in addition to being an international cartel.

Now, if your Honor please, on the patent license side of the case, your Honor wrote an opinion with which it is going to be difficult for any of us to quarrel, and again if you will forgive me for pointing that way, and your Honor knows I am not trying to seem as if I were handing compliments up to the bench which does not mean much, but I only say that the opinion strikes me as one of those antitrust opinions that has strength within itself, because it is factual.

Now, as the opinion goes along it makes certain findings and draws certain inferences against du Pont, and those findings and inferences relate to the activities of a Mr.

Rupprecht almost exclusively in the year 1933, but I quite agree continuing down in their effect at least to the forties, and there is a finding, to revert to the findings, that the exchange of know-how, for example, ended in April, 1940, and after that it was a question of the continuance of the license agreement and, as we all know, Mr. Rupprecht is dead.

3818 The result of that is that one does not have before him an opinion or findings which would lead any court to feel that it was dealing with a substantive intent toward wrongdoing in the titanium field, which is all we are concerned with, on the part of the DuPont Company.

The duPont Company is in the position that it has found that one of its managers did a positive wrong in joining an international conspiracy in 1933, and that certain necessary effects and consequences of that joining and the agreement represented thereby have flowed on down. That is the size of the case.

Now, your Honor was very fair again in pointing out that the duPont position was entirely different from the National Lead position. I do not need to belabor the phrases. They are familiar to all. Your Honor was so kind on our side of the case, so just as to point out in many different phrases that our agreement deviated sharply from certain other agreements, and that our position was in short contrasted to that of certain others and so on. Now, finally, as it has been abundantly pointed out this morning by your Honor, we are not here concerned with the type of case in which either the charge or the offense was of our growth as such. There is no charge and there was no charge ever that we had wrongfully acquired extra plants or absorbed extra companies and were on the road toward a monopolization or restraint of trade.

3819 Now with that background I come to the law, and I have I hope in good humor twitted brother Dixon once or twice during the trial about his reluctance to recognize the Hartford-Empire opinion, and I went away before lunch in order to give him ample peace and time to read it, but he has had the charming insouciance, to say to your Honor again that he is not very clear about what it means, but being reasonably clear about what it means I want to go briefly into it, because it is obviously the law on this topic and has been decided within the last 12 months. Before going into it, though,

I want to note this vital point: When the Hartford-Empire situation and this system of licenses and agreements in the glass industry was disclosed to this country in 1938 we were all, even those of us in dreadful Wall Street, profoundly shocked. It was a scandalous picture, and it was treated as such. It was a case that was immediately brought, the Hartford-Empire case, in order to pillory one with the worst examples, and then it came on to trial, and you can't read of a more arrant set of violations of the antitrust laws than are described in the opinion of the District Court for the Northern District of Ohio, and that opinion and those findings of fact were adopted by the Supreme Court of the United States and, as Mr. Justice Black said, "The history of this country has perhaps never witnessed a more completely and successful economic tyranny over any field of industry than that accomplished by these appellants."

3820 And Mr. Justice Rutledge wrote a separate opinion, as they were anxious to explain clearly their immediate positions in the case without indicating any easy going along together, so that they each had their own viewpoint and that is why they wrote separate opinions, but Mr. Justice Rutledge said, "This is a long adventure in monopoly and unlawful restraint of trade."

Now, it was because those two dissenting justices found that this was a scandalous case that they suggested that there ought to be particular remedies going beyond the duration and regular remedies applicable under the antitrust laws in this particular case, and here in our case we have just the opposite.

We have got in respect of du Pont at least an opinion and finding which show that although the learned district court judge has been satisfied that in substance and effect du Pont through Mr. Rupperecht did join the conspiracy, yet he has been at pains in justice to point out the moderate extent of the violation, and thereby making this the opposite kind of case from the Hartford-Empire case as a matter of degree, because Mr. Justice Holmes taught us all that all law at least ought to be a matter of degree.

Now, therefore, I am saying not by way of argument, but I submit to your Honor that the decree in this case in respect of du Pont ought to be definitely and
3821 measurably milder than the decree against the Hartford-Empire Company. Now with that background I come to the Hartford-Empire opinion and the majority opinion for the Court. Although one of the most agreeable

intellectual pursuits I have had since I got back last week has been reading your Honor's opinion about doing business as the result of solicitation, and having had occasion to appear before the learned justices who sit on appeal in these cases, I think your Honor turned over backward because I think perhaps you could put a few more in. But however that be, I do not fear very much such an intellectual adventure in respect to the present constituency of our Supreme bench when it comes to reviewing an effort by these earnest young men within 12 months to overrule or bespatter its last year's decision. I am not afraid of that. However that may be, here was the decision: Now, at pages 4 and 5 of the opinion we are told that there were a group of exclusive licenses, the critical distinction between exclusive and non-exclusion, and we have not had exclusive licenses exchanged with National Lead. We did unfortunately and you have found it to have been wrong in doing so granted some exclusive licenses abroad, but we had no exclusive licenses inside the United States. But in this case, describing Mr. Justice Roberts' outline, there was an exclusive right to manufacture milk bottles in the Thacher Company, and there was an exclusive right for fruit jars in the Ball Company, and in effect the 3822 Owens Company had exclusive use of certain types and methods of manufacturing.

Now, that was a profoundly different situation from that in our case and merited very much more severe treatment. Then in addition Mr. Justice Roberts points out that the defendants had pooled the efforts of their legal staffs and contributed equally to the purchase of patents and the expenses of litigation except for one patent purchased back in 1934, the Leuchs patent. They had not anything of that sort in this case.

Then when it came to the commercial features, on page 8 Mr. Justice Roberts points out that the parties assigned production quotas. Your Honor has found just the opposite here. They allotted production in one field, in one company, and in turn to other companies.

The production and the manufacture and the sale of machinery was suppressed and prices were maintained by agreement. Then he points out at page 13 the distinction between legitimate use of patents and the prohibited abuse of the restrictions incident to the ownership of patents, and refers again to the suppression of competition and the employment of the joint patent position to allocate fields of manufacture and to maintain prices, the same points again exactly.

Now, it was against that background that the majority of the courts proceeded to review the decree and to enter the reversal of what had been done before.

It stated the principle on page 50 that we may not 3823 impose penalties in the guise of preventing future

violations just like your Honor said this morning, that the theory of the equitable jurisdiction under the anti-trust laws is not to punish and put the defendants in a different non-competitive position with others. The Court said in the Hartford case that you may not place the defendants for the future in a different class than other people, the "in a different class from other people" being in itself quoted from prior opinions, I believe, of Mr. Justice Holmes in the Swift case.

Now, the practical applications of those principles so far as we are concerned occurs first at page 19, or pages 18 to 21, and I will summarize it in this way: On 18 the Court is considering the vital paragraph 24 of the decree of which A provided for royalty-free licenses under existing patents and, B, for licenses at a reasonable royalty under future patents and, C, that the defendant should make available the knowhow; that is to say, should make available under A and B at cost plus a reasonable profit all drawings and patents relating to the machine y or methods used in the manufacture of glass where embodied in the license invention.

Now, then, the court as it were applied a subprinciple to this specific principle and said in effect that it goes beyond what is required to dissolve the combination and prevent future combinations of like character.

3824 Then turning over to page 21, the Court ruled on what was required, and as to A they said that as to existing patents the decree should be modified to permit the reservation of reasonable royalties. As to B they said that a defendant hereafter acquiring a patent must be entitled to a satisfactory price if it is used by others electing to use it, or refused as a license and so forth.

Now as to C they said that this paragraph 24-C should be deleted.

The COURT. That is the knowhow provision?

Mr. WHITNEY. That is the knowhow provision.

Now, if your Honor please, when the time came to have a rehearing on this a few months later the court, as courts generally do on rehearings, adhered to its position. Of course, I pointed out to the Government only a few comparatively minor changes such as where the words

"standard royalty" were changed to "uniform reasonable royalties." The other provisions of the decree to which I have made reference stood as they were and that one, of course, stood in substance, and I cannot avoid having a little humor mixed with my sympathy for Mr. Dixon when he says in effect that the Court did not know what it was doing.

Now he has been very fine about it. He did not go as far as his brethren did in the vehicular case, which, if your

Honor wants to read a special pleading in a desperate cause he would read the type of argument to

3825 Judge Leahy, that in effect Judge Roberts did not know what he was talking about, because he thought he

was talking about rentals all the time, and must have been surprised after the rehearing because he was still using

the word "royalties" when all the time he was talking of leases and rentals. The only reason I mention that is

because today Brother Dixon still comes here and talks about what Judge Leahy really wanted to do. Well, Judge

Leahy does not say really that he wants or wanted to do anything different from the Supreme Court. He just

makes a flat decision. He just says, "The Government now urges that a provision for royalty-free licenses must

be inserted in the decree, and if defendants object the objection will be sustained because I am unable to agree

with the Government's reading of the Hartford-Empire case. I am unable to agree that the Court has power to

mandate a royalty-free license where the patent has been used as an instrument in violation of the antitrust laws.

If the Court could permit such a provision it would obviously be tantamount to cancellation of the patent." He

goes on to say that the patent is not to be cancelled by making it royalty-free because it was once used as a device

to violate the antitrust laws and so on.

The one possible explanation I can think of concerning Mr. Dixon's extraordinary theory is that perhaps when he

is telling a district court judge about a certain

3826 decision by higher authority, that it must be read with the thought in mind that he does not agree with

the higher authority instead of meaning simply that he is practicing a judicial function in accordance with the age-old Anglo-American tradition.

Now, if your Honor please, you will find that case or you have probably read it, but it is in the C.C.H. Trade Regulation Service at page 57, 935 in their delightful way of paging, the issue of September 13, last month. It has

not yet come out in the reports, so far as I know, and it being the only District Court case up to date on this weighty issue—

Mr. WEBSTER. There is another decision, your Honor, which is referred to on page 35 of our memorandum, a decision by Judge Wyzanski.

Mr. WHITNEY. Well, the Standard Oil case, it came in sort of indirectly, and Judge Wyzanski's opinion I do not have here, but it is consistent.

Now the result of my submission to your Honor is that the only serious problem in this group, and before any court after all we must consider this as if your Honor had been removed to some higher sphere, I mean on the earth, and after finding these facts and writing this opinion, and a new judge came on as the appellate judges do, and said, "Now, here is the situation," and I respectfully submit that the only question for the Court in that posture would be what if any should be the modification of the
3827 Hartford-Empire decree comparable to duPont, or beyond what was comparable to Hartford-Empire.

Now in substance we are prepared to accept most of the Hartford-Empire decree. We have only suggested a few modifications and very mild ones, because we have a certain deference to the injured feeling of the Government, and we want to show a decent modesty even though we think we are entitled to more.

After all, we agree to royalties that we think we can competitively live under or that are fair. Curiously enough, we do not always see eye-to-eye with Mr. Webster, and I might explain those differences in principle so your Honor will have them clearly in mind. We generally, of course, take the same line he does, although we are not involved as he is with the foreign contracts and agreements.

We agree first, of course, that the agreements must be struck down in their entirety, as they were the cause of the whole thing. I would be quite prepared as a lawyer to make an argument that I think would be an honest and a sound one to your Honor that the decree in this case should stop there. Now, why?

Under the patent law as Congress has refused to amend it a patentee is free to grant licenses or to withhold licenses as he sees fit, and the wrong here being the entry into certain agreements, and those agreements being
3828- struck out it would seem that that should end the matter in accordance with the subject of decrees under the antitrust law.

For example, the Antitrust Division in January, 1938, published this little blue book. They have not published one since. It is the most admirable summary of the 428 cases up to that time under the antitrust laws. True, upon reading it you will find that excluding the indictment cases and excluding the equity cases where the facts were not heard on the merits, the form of relief was uniform through literally upwards of hundreds of cases. They were the elimination of the practices complained of; they were enjoining combinations; they were declaring illegal and perpetually enjoining its operations and so forth and so on in every case. That was the standard and uniform interpretation of preventing and restraining, and this case, I respectfully submit to your Honor, comes to its proper end as far as du Pont is concerned after you cut us free entirely from any existing National Lead agreements.

Our manager, Mr. Rupprecht, got us into something in 1933, and your Honor said consequences have flown from it of a serious character, and your Honor has it in your power to cut us free from that, and when that be so then we go on in competition, and I respectfully submit that that is the only decree that ought to be entered.

However, in deference to the wishes of perhaps 3829 more practical associates of mine we have submitted to your Honor a draft of a decree in which we have gone considerably further and quite specifically after making a definition which is slightly different from the Government's definition, very slightly. For example, we have changed "construed" and we have eliminated "and compounds" after "pigments". We have undertaken to concede that there should be given a direction to us that we must as in the Hartford-Empire case give a license on uniform reasonable and non-discriminatory royalty terms, and that is paragraph 5, on page 3 under our existing patents, and they are listed in appendix A, schedule A, to the draft.

Now, we don't see any reason at all why we should be compelled to license as to future patents. We have been free of the exchange of information with National Lead for five and a half years, and we are perhaps developing inventions of our own, and doubtless Cyanamid and Glidden and National Lead may be developing patents of their own, and so may outsiders. Indeed, if I might copy Mr. Dixon's freedom of slightly going off the record,

outsiders are doing it, and there are very large companies filing applications, and indeed we are pretty frightened about some of them.

Now, Mr. Gesell points out that we have in our appendix the existing applications as well as the existing patents, everything that has yet been filed. And that

I submit to your Honor is the maximum to which 3830 your Honor ought to go in respect of du Pont, having judicial regard to the Hartford-Empire case.

They say royalty-free, no uniform royalty. That infers that there be reciprocal licenses to the other parties. That is to say, if any party licenses it must be on the other party's reciprocal licensing.

The COURT. I am curious about that. Does that other case, the Hartford case, require reciprocal licensing?

Mr. WHITNEY. I do not think it has any, your Honor. It has been in the general run of consent decrees, and I think the explanation of Hartford-Empire was—

Mr. DIXON. Only as to parties that are party-defendants to the present time.

Mr. WHITNEY. I beg pardon?

Mr. DIXON. Only as to parties that are party-defendants to the present time.

Mr. WHITNEY. Yes. I think the Hartford-Empire situation was peculiar in that the Hartford-Empire Company was exclusively a licensing company, and what it had done was try to monopolize all the licensing, and so it was visualized that the one-year brand license by Hartford-Empire, which, after all, was to escape the dissolution and every other thing that was hanging over it. But we think if the point is going to be, and I hope it is going to be, to throw open the industry so that everybody can license each other, and each man charged

whatever is a reasonable royalty, and people can 3831 refuse to take a license or decline to take it, that then at least the cards would always be stacked against us, and if we were compelled to license people who refused to license us back, that would mean that we would be sued by those people at the very moment that we were licensing them.

I now come to a point at which we diverge we regret from Mr. Webster, and that is it seems to us that the logic of the decision must be that National Lead and we do not go off exchanging royalty-free licenses, but that we have to respectively make sure of the order that we were licensing from each other and, if so, we would have

to pay whichever one of us took the license a royalty, or if both took it we would have to pay cross-cutting royalties.

I notice your Honor never misses a point like this, and, so—

Mr. WEBSTER. Your Honor, it seems to me—

Mr. WHITNEY. —rather than hide it I would say it looks as if we both have to take licenses from each other, and maybe we would make a little bit of change if—

Mr. WEBSTER. Your Honor, it seems to me, so that there won't be any confusion about this, that I should state that we are not suggesting that there should be royalty-free licenses in respect to du Pont. We are simply saying that the decree should be so drawn if we are on the same footing—

The COURT. I understand.

3832 Mr. WEBSTER. In respect of du Pont.

The COURT. Yes, I understand.

Mr. WHITNEY. I misunderstood it. Thank you.

Mr. WEBSTER. And this provision for reciprocal licensing is not a case in which the Court requires reciprocal licensing.

The COURT. I understand.

Mr. WEBSTER. It simply provides for compulsory licensing on condition.

The COURT. On condition. I understand that.

Mr. WHITNEY. Well, your Honor, that really brings us into harmony, as previously we did not quite understand it.

Finally, if your Honor goes against us and wants to impose something in respect to future penalties, why, then, I would suggest something like six months, which is the formula your Honor could use or perhaps alternatively until the effects of the conspiracy shall have been dissipated.

Now the difficulty I think with the second one is that despite its theoretical soundness it does not seem to me very practical, because it makes us come back to your Honor, and then we have the question as to what is the conspiracy, and obviously we ought not to have to answer in our domestic field for the effects of these international negotiations which may go on for years, and that has been the essential conspiracy in this case, so that

3833 I think I am being fair in suggesting the compromise with the Hartford-Empire doctrine, that we be made to give royalties under our existing patents if your Honor will have in mind any existing patents and appli-

cations filed up to five years after the ending of our exchange of knowhow with National Lead.

The COURT. Yes.

Mr. WHITNEY. I appreciate that your Honor has found that we have an unreasonable advantage over competitors by this exchange, but whatever advantage we had in the way of enabling us to make inventions, patentable inventions, and file applications thereon, must have been exhausted well within the period of five years. In effect, as I submit to your Honor, a true cutoff date would be as of that date, April, 1940, and then in effect we are putting in the future inventions for five years thereafter, thereby meeting with what we think to be the reasonable side of the Government's five-year suggestion by taking patents as of now instead of patents as of April, 1940.

The COURT. Let me ask you just one question which occurs to me.

Mr. WHITNEY. Yes, sir.

The COURT. Assume a situation whereby that was extended for a short period of time beyond this date, wouldn't that simply lead to a condition whereby the filing of the new application would be deferred until the expiration of that time, or is there some 3834 risk involved in such deferment which I am not aware of?

Mr. WHITNEY. Yes, your Honor, there is a big risk involved in it, because you have got to file promptly after conception, and then you may have to prove your conception.

The COURT. And if somebody else files in the interim?

Mr. WHITNEY. Yes, so that it would not be a practicable thing to dodge around it.

The COURT. It might if it were a very short period; say if it were three months.

Mr. WHITNEY. I can only say this, your Honor: I do not claim to be a patent lawyer, but I have dealt a good deal in patent matters, and it is a terribly dangerous game.

The COURT. To delay it?

Mr. WHITNEY. Yes.

The COURT. All right.

Mr. WHITNEY. Now the thought that I would like to leave with your Honor is that five-year thought, which I think is an unusual one because it is quite a unique thing where in fact the exchange did happen and terminates more than five years.

The COURT. Yes.

Mr. WHITNEY. Now, then, as to the knowhow, your Honor, I think the Supreme Court obviously thought very strongly about it because it just said no. It is 3835 very curious to realize that it said no in respect of the true octopus, but I think the very real reason was the reason that has been missed by some of my friends. It is the reason that your Honor had hold of when you spoke of the fact that a patent ought to make a disclosure sufficient to enable it to be worked.

Now at some point there comes the ending of the disclosure of the invention and the commencing of the more mechanical technique of working it out. Of course, I am going on the theoretical basis that the patents are real patents:

Now it is really in restraint of competition in the true sense of the word to have any one or more companies, telling all the other companies all about how to do everything, because there has got to be some reward for originality and ingenuity in working things out. It may be precisely because we got a better mechanical technique that we got ahead, or the others perhaps got ahead of us because of their better mechanical technique, but if the District Court is going to set any value of our respective disclosures it is going to take on a task from which perhaps the Supreme Court would recoil. After all, it was originally one judge who had the knowledge to realize that he could not issue a mandatory injunction, but it was a new doctrine when he announced it in 1857 or whenever it was, and it may well be that the Supreme Court knew very well what they were doing.

3836 I think we have to always assume when they have done something clear that they knew what they were doing, and that is that it was not any use for courts of equity to embark upon further extending the patent conception by mandatorily ordering companies to tell each other the way they operate, which would really open the way to all sorts of devious withholdings of information back and forth, and all sorts of charges and countercharges. Let them each go as best they can and see what the other fellow has done as soon as the product comes out, and let them use their own ingenuity in trying to find a way to get at it.

Of course, it is not always realized in that fashion, though. These are great corporations and there are still incentives to ingenuity; because the individual man gets

a higher salary or gets additional pay if he finds a new way of doing it, and if his company has to give it right away to the competitors, he is not going to get those rewards. Now, therefore, he is going to have that much incentive.

Now, of course, in this case, five and a half years ago we cut off this exchange of knowhow, and now we have to start in again pro tanto to putting an end to the competition. Of course, at all events, I think it is better to stand on the Supreme Court opinion. I am only citing a few suggestions as to why they gave the opinion they did.

Now, finally, I think that applies to everything
3837 of substance except this matter of divestment, and I am so bold as to have drawn the impression that your Honor this morning realized the wrongness of that, and the only thing I would like to say is this, and I want to say it in quite an informal way if I may, your Honor. Mr. Dixon speaking off the record, and I protested as usual or as it is my duty to do or my conception of my duty, and I only want to say that I can bring evidence here on that issue. I can bring actual witnesses about the prospects of expansion in this industry, and Mr. Dixon can cross examine them, or I can put in applications to the War Production Board that are official records and can prove by the War Production Board, due to the happy circumstances that some time results even out of the worst situations the fact that people have applied for priorities, and at least as they are our competitors and we are their competitors, and these people, as I have said, have applied for priorities and are proposing to double their capacity, and it is no doubt public knowledge.

3838 I have no doubt that the Supreme Court, and I suppose your Honor, would accept a citation to it in a brief almost but we are reluctant to point the record on that sort of thing for merely prudential considerations, that is to say, merely a matter of time. In other words, if it is not necessary we do not want to go into it and of course I realize that if your Honor says, "No, I am not going to answer your question, Mr. Whitney,"—because I must accept your Honor's answer and then confer with my colleagues and then make a request—but would your Honor consider it unfair if we were to ask you whether you might indicate whether you are ruling with us or against us on that issue, because if you are ruling with

us I do not think we would have to write a brief, and, of course—

The COURT. I do not know the answer now, but I think it is perfectly fair for me to say I will tell you in sufficient time to give you the opportunity to do that if I think it becomes necessary.

Mr. WHITNEY. Well, I thank you, your Honor, because I think the Government will be pleased with that.

And the only final thing I want to say about that is on the law and it has already been well said by Mr. Webster and I doubt the advantage of saying it again but I will just summarize it. As I see it, and I have made a considerable study of the antitrust laws, there have broadly

been two types of cases; the first is what we might
3839 call the big glamour case the public generally thinks about and actually the Senators and Congressmen were thinking about when they passed the Sherman Act.

Those are the cases of a single big company which has acquired additional plants and builds itself up into a great big classification like the Standard Oil or, as Mr. Dixon referred to, the tobacco, steel and aluminum industries and in the Circuit Court of Appeals, but in between a number of others like Reading where they have spread into other fields, coal as well as railroads, and so on. Now, in those cases the gist of the wrong is the acquisition of the additional properties and the additional companies and therefore the dissolution of the combination involves the divestment of the additional properties. The other class of cases, which was not much in the mind of Congress I dare to think when the Act was passed, but which has provided the heavy majority of the cases, have been cases in which two companies made an agreement between them, which agreement was of a character objectionable under the antitrust laws, and there the uniform system to which I think Mr. Dixon is not disagreeing this morning when your Honor called for authority, has been to strike down the agreement. Now of course to people whose minds run more largely to the left wing or who perhaps are more forward looking than backward looking it has tended to say, "What is the use of a system of law
under which you only stop what is being done.

3840 There ought to be a little punishment added on too." But what I think they have overlooked is that the Sherman Act provides for punishment if the Government wishes it, and I think the reason it has developed into equity under the Sherman Act and they simply strike

down the agreement is it is recognized there can be both kinds of suits in the situation, and indeed there are both kinds in this situation.

That also is of aid in discerning the difference between two defendants. Mr. Webster's client may be as beatific in reform as we were, but I think he will have to agree it was a naughty boy originally.

Now insofar as a statute is to have any element of punitive application as distinct from purely remedial application, then it becomes an important judicial function to measure the punishment to the crime. Obviously whenever there has been a conspiracy in the criminal courts and two or more have been convicted they get different sentences depending upon their respective participations. So that if there be any punitive element to come into this, whatever there should be, there should be a divergence reflecting the divergence in the guilt, but if it be remedial then it stays remedial.

Now we have passed out of the 17th and 18th century logic in the law and I am quick to concede there is something in the nature of a punitive element in our present antitrust decrees. I say in the nature of it because I 3841 think what it really serves is that where the Court is certain that a certain result will not be achieved by a certain kind of decree than it may give more which looks to the outsider like punishment but really is a greater remedial act. It is very interesting that neither Mr. Justice Black nor Mr. Rutledge came out and said even those people ought to be punished. What they said was, "These people were so bad that we do not think you can cure their wrongdoing by your kind of a decree." And the majority said, "We will give them the worst decree we can short of confiscation," and the majority certainly recognized that the problem was not A, B, C, because the majority were all the justices who participated in affirming your Honor's decree to which you referred this morning, and they recognized that you want in a bad case like the Hartford-Empire to go beyond the mere technique of striking down existing agreements, not because you were punishing; not even Mr. Justice Black and Mr. Rutledge, but because you were giving full relief.

Now here I submit to your Honor that more than full relief would be given by requiring us to open on a uniform royalty basis to the whole world our existing patents, because more full relief or full technical relief would be given by striking down our contract between ourselves and National Lead.

The COURT. The thing that troubles me about divestiture, Mr. Dixon, is this: Where you have a case where company A and company B have been joined together and the Court orders them disjoined, you know company A once had an independent existence and conceivably might carry on in the future as an independent enterprise. Here you have one company and you start dividing it. Let us assume it has two equal plants but it has not got two chief chemists. It may only have one chief chemist. It has only one board of directors. It has only one chief executive, one sales manager, and so on. All of those constitute, of course, the company. Would not the Court be taking a very grave risk, in effect, to say that we will take a certain fund of capital which does not belong, of course, to the management at all—it belongs to the stockholders and creditors presumably—and that we will set it aside and sever it and then we are going to—I do not know by what method—set up the various personnel organizations in the two enterprises and hope that each of them is going to become a living business enterprise. It takes more than just a plant and a fund of money to constitute a business. Now of course the only precedent I know where dissolution was used in a difficult case—it was used only in a minatory way—was when Solomon ordered the child divided, but he did not mean it. I am afraid we may slice the child up if we did that. I do not know. Those are thoughts running through my mind and I want to think about that.

I take it Mr. Dixon will want to have some more things to say and I also assume we may want to go in
3843 an actual reading of the text of the decree, but

I think it might perhaps be useful if I had a chance to read some of this material. However, I will do it either way you want. We will resume tomorrow or resume after a few days. Which do you prefer?

Mr. DIXON. Speaking only first for the Government, we would prefer, since we are here, if it is agreeable to the Court, to resume tomorrow.

Mr. WHITNEY. Your Honor, my colleagues came from Wilmington and Washington and they will be agreeable if we can move along as quickly as we comfortably can, whatever you think best, so we can sort of keep moving along and we do welcome the opportunity, when your Honor comes to lay down to us what the substance of the decree is, if we could have a last opportunity because some time a word slips in here and there.

The COURT. I will give you the same opportunity on the decree as I did on the findings so we can safeguard that.

Mr. WEBSTER. I think we have gone along so far today in thrashing out the general principles involved that it would be desirable to proceed tomorrow anyhow if your Honor is prepared to do so.

The COURT. I am.

Mr. WEBSTER. In that connection we have some suggested substitutions I might hand up to your Honor (handing).

Mr. DIXON. I am not certain whether your Honor has readily available, and if not I will be glad to present 3844 to you, copies of the Hartford-Empire case—the two opinions of the Court in that case.

The COURT. I will be glad to take them. I have no doubt they are in my chambers, but if you have them in convenient form I will take them.

Mr. WEBSTER. In addition to what we have today, your Honor, in typewritten form we suggest that paragraph 13, sub-paragraph 2, be removed entirely as unnecessary as simply covering ground otherwise covered.

The COURT. All right. Then we will resume tomorrow morning at 10.30 and we will try to move along as rapidly as possible and any points that I find impossible for reaching agreement on I will tell you so we can get to actual drafting at as early a date as possible.

(Adjourned to October 2, 1945, at 10.30 a.m.)

3845

UNITED STATES OF AMERICA

vs.

NATIONAL LEAD COMPANY, ET AL.

New York, October 2, 1945; 10.30 a.m.

Hearing resumed.

The COURT. The exhibit which we received yesterday is now marked Government's Exhibit 646-A.

And these documents which you have handed up are the final print of the findings?

Mr. GESELL. That is right, your Honor.

The COURT. I shall sign one of them and have it filed.

Mr. DIXON, are there any general remarks you wish to make this morning?

Mr. DIXON. Yes, your Honor. May it please the Court, first I find that I inadvertently yesterday overlooked the

fact, when discussing the patents, that the Alien Property Custodian had vested title in 32 of the patents involved in the litigation, so that when the final decree is worked out that fact, of course, would have to be kept in mind insofar as those particular patents are concerned.

Now I wish to briefly comment upon the defendants' proposals as submitted to the Court yesterday as to the relief which they are suggesting the Court grant the Government in this case. At the outset, as I understand 3846 the position of duPont from their argument yesterday, they take the position that this is only a patent licensing case and therefore the relief involved should only go to such type of remedy as the Court can give concerning the patents involved. We do not in any sense of the term concur with that limitation upon this case. In our opinion this is definitely a combination case and it is no better demonstrated than the findings of the Court, particularly those which point out the necessary effects of the combination. In finding 59, for example, where the Court has found that the necessary effect of it has been to give duPont and National Lead joint domination and control of this industry.

We are dealing here with a practical situation, and as I looked over and listened to the proposals made by the defendants as to the type of relief concerning patents which they were suggesting the Court grant, I am frank to say that I was wondering who had won this lawsuit, and in a sense that if the proposals which the defendants are apparently seriously making here are accepted by the Court, I don't think it takes more than even a cursory analysis to see that the defendants would be much better off in every way with this lawsuit over.

The Court. Well, I have not any doubt about it. That is the object of the lawsuit; to put all these defendants and all other producers of titanium in what the statute regards as a superior position. I suppose if it is true, 3847 as the statute says, that the competitive system is superior to the regulated commercial system, then the fact that we create a competitive system should benefit not only those who heretofore were with it but those who were not, and naturally I would suppose they would make more money, produce a better product at a cheaper price and serve their stockholders with greater dividends. That would not prove that the decree is bad. That would indicate that the decree had achieved perfection.

Mr. DIXON. Perhaps I created the wrong impression with the Court. I meant to indicate that the defendants would be better off in the sense that they would be securing not only patents from each other which they now have on a royalty-free basis, but they would be receiving royalties on those patents which they are not now receiving and, secondly, if serious consideration is given at all to the proposals, cross-licensing of patents and know-how as submitted by the defendants, we would find that the other companies in the industry, for example, would be required as a condition of the receipt of any license from the defendants to give to them licenses of their patents.

The COURT. Now let me put this question to you—

Mr. DIXON. Yes, sir.

The COURT. —and I am reacting only to your suggestion without any previous reflection on this problem.

Mr. DIXON. Yes, sir.

The COURT. Let us suppose that upon any particular day in the course of this year, without analyzing a condition affecting titanium, there having been no lawsuits, no indictment or anything, and we had found the following conditions to prevail: That there were two companies in the field in active competition with each other; that the policy of each of those companies was to offer licenses upon all their respective patents to anybody who applied to them at uniform and modest royalties; that in response to this general invitation several companies had applied and had received such modestly priced license agreements; that it was one of the conditions of such license agreements that persons so taking advantage of this general offer open to the whole world was to extend a similar and reciprocal opportunity to the offerers, and that as a result of that these several companies that had taken advantage of those offers had for modest royalties licensed these two companies, and the result was that we had four or five or six companies in the field; that each of them enjoyed access to all the patents in the industry; that all of them were, therefore, able to make use of the most advanced art in the industry and that the product consequently had been much improved over a short period of years; that there was no territorial allocation; that there was a freedom of international movement, and that there was price competition, quality competition and every other form of competition that you can envisage; assuming that were the fact
3849 would you not say that that was the ideal condition

contemplated by the Sherman Anti-Trust Law?

Mr. DIXON. The answer is obviously yes, your Honor.

The COURT. All right. Now let us see whether some of your strictures upon some of the suggestions made are well founded. Tell us what would be putting the defendants in a better position, and by "better" I suppose you mean that which is more consistent with the antitrust laws, A, no territorial agreement; B, no non-competing agreements, C, compulsory licensing at uniform and modest royalties. I am using the word "modest" in lieu of the word "reasonable" because I want to suggest what is intended, the intention being a condition such as the industry can readily handle without establishing an undue advantage one over the other not justified by an investment involved in these patent ownerships, and also as it is suggested in one of these propositions, not only as to all existing patents but as to all patents filed or issued over a period of five years, or all applications that will be filed over a period of years, I do not remember which.

Mr. WEBSTER. Yes, your Honor, all patents issued over a period of five years.

The COURT. Yes, all patents issued over a period of five years, and that will presumably take care of all applications now in and those that will be put in as a result of inventions made within this period of time.

3850 Now, why doesn't that begin to approximate, forgetting now the feature of costs; you know what I mean, forgetting that feature; and assuming that you may have to do more in order to prevent a recurrence of the inertia and a continuance of certain factors as a result of the inertia; but assuming the past and assuming that was the condition created, why doesn't that approximate the condition which you a few minutes ago assented would constitute an ideal situation under the Sherman Anti-Trust Act?

Mr. DIXON. Well, my first answer to the question is that it gives to the defendants the full benefits of the position which they now enjoy in this industry and which they have reached—

The COURT. By unlawful means?

Mr. DIXON. That is right.

The COURT. Now if by benefit you mean wealth, there is a way of doing it; that is, you can indict them, try them and convict them and fine them, and take some of that wealth away from them, but is there any method under

the equity procedure by which we can make them disgorge their ill-gotten gains? Is there any such method?

Mr. DIXON. Definitely yes, your Honor. We feel that there is, and that is the reason why we have requested the partial or total dissolution of these companies.

The COURT. You mean by divestiture?

3851 Mr. DIXON. Yes, divestiture.

The COURT. That does not really, strictly speaking, make them disgorge, because presumably they would get their money back for whatever they disposed of.

Mr. DIXON. That is true, your Honor.

The COURT. So it does not deprive them of their wealth.

Mr. DIXON. The purpose, of course, of asking for a partial or total divestiture is not as indicated by the defendants punitive. In one sense, any remedy which the Court grants here might be construed as punitive, but it depends upon what you call the effect of what you are trying to achieve, and it is the effect or the dissipation of the effects of this combination that the Government is concerned with, and that is all.

The COURT. Let us focus attention on precise propositions.

Mr. DIXON. Yes, sir.

The COURT. Is it the object of an antitrust proceeding to dissipate the effect of an antitrust violation, to wit, the effect of the defendants having grown strong and powerful? Would that effect in and of itself isolated from other effects bring about such a condition and, if so, has the Court ever done this, namely, try to dissipate the commercial potency of an offender under the antitrust laws where you did not have aggregations, mergers
3852 and combinations which are simply undone, but merely financial and commercial potency. That is what I want to know.

Mr. DIXON. Yes. Your Honor's question, of course, goes directly to the point, and I intended to pass upon it or discuss it hereafter, but I am very glad to discuss it now.

The COURT. Any way you see fit.

Mr. DIXON. Because it does, in our opinion, go to the crux of the relief which this Court in a decree could grant to the Government or the public.

The COURT. I think you are right. It does.

Mr. DIXON. Now, as indicated yesterday, we are fully satisfied from an examination of the cases that the precise question which your Honor has asked has never been passed

upon by any court in the sense that you are effecting, assuming you do, a break-up of a company or companies which have achieved their size and which gave them the domination in the industry without the acquisition of any competitive units. In other words, the cases on that and where dissolution has been effected are, of course, the Standard Oil Company case and the tobacco cases.

The Court. No, I think there are cases which are against you on that. For example, let us draw a fairly necessary inference from the aluminum case. Now, the fact that the Court in dealing with the aluminum case, as I see it, said, "We will wait until after we know
3853 what happens from the disposal of the surplus plants. We will wait and see."

Now that suggests what might become relevant to the issues; otherwise there would be no point in waiting. It would follow, therefore, that if it develops that as a result of the disposal of the aluminum plants by the Government that other active competitors came into being who will operate in competition with the Aluminum Company, then presumably the Aluminum Company is not going to be shrunk down in size.

Now, clearly, if ever there was a case where the Court found that a Company had become big in part by virtue of the violation of the antitrust law, I think the aluminum case is one. Am I wrong about that?

Mr. Dixon. No, I think you are right, your Honor.

The Court. And, nevertheless, the Court did not say, in following your analysis in an attempt to agree with you—

Mr. Dixon. Yes.

The Court. —it didn't say regardless of the character of the competition which may develop by the post-war disposition of the surplus aluminum plants we think the Aluminum Company has become big and powerful as the result of violations of the antitrust laws and must be deprived of that power and strength and, therefore, we are justified to A. split it up; or, B. compel it to close down; or, C. abolish it altogether. I do not know, but the fact is that they did not do any of
3854 those things but instead they said, "Despite the violations we are going to wait and see and if reasonable competition is established by virtue of those other plants, then we are going to let the Aluminum Company stay put."

Now doesn't that affirmatively show that your theory

not only has not been dealt with affirmatively by the courts, but that a contrary direction has been given it by the latest decision that we have on the subject?

Mr. DIXON. May I respectfully suggest to your Honor—

The COURT. That is simply a question. I am not committed to that view.

Mr. DIXON. Yes.

The COURT. I have to keep repeating that.

Mr. DIXON. All right.

The COURT. Because every now and then I get questions read back to me. However, this is not my judgment, but it is simply a question.

Mr. DIXON. Yes, sir, and naturally it is a very fair question, and in answer to it may I suggest that there were other considerations entering into the decision in the aluminum case, particularly the effect of dissolution during a war, which would obviously mean the disruption, assuming it were accomplished to an extent perhaps of the administrative facilities and so on; the productive facilities of the Aluminum Company.

Now, as we construe that opinion, that was certainly one of the factors entering into the exercise of the discretion of the Court, and in suspending, shall we say, final judgment on the question as to whether or not the Aluminum Company as a monopolistic creature created through the practices referred to in that opinion should or should not be dissolved.

The COURT. What did they say as to the reasons? What reason did the Court assign for this waiting? Did it say, "We do not want to upset the productive capacity of this enterprise in the midst of the war?" Or did they say, "We do not know what kind of competitive effect will be created as the result of surplus disposition"?

Mr. DIXON. Your Honor's second remark is, the statement of the opinion.

The COURT. Well, aren't we, therefore, entitled to infer that that is the reason which motivated it?

Mr. DIXON. Well, in a sense you may. In our opinion, the Government does not so construe the opinion in the sense that it was a finding by the Court that dissolution of the company would not be effected if it should develop upon further evidence that dissolution was the only way of restoring competition to the aluminum industry.

The COURT. That is right. I quite agree with you and underscore the purpose which you have said. In other

words, they would dissolve the Aluminum Company
3856 if that were the only method of restoring competition to the aluminum industry. They would not dissolve the corporation merely because it had become fat by virtue of law violations.

Mr. DIXON. However, to go a step further, may I suggest to the Court that we clearly take the position that the principles of equity are such to prevent, or should prevent violators of the law to retain the benefits of that violation.

The COURT. I underscored that difficulty in a footnote in my opinion. I do not know what to do about it, and that is where I am waiting for a construction which would give me a sense of moral pleasure undoubtedly, or would give a judge a sense of moral pleasure if, having found somebody had violated the law, he could in some way exact retribution, but I do not know how to do it. Now you show me how and I think it would give me some satisfaction to do so, because I have no doubt as to who won this lawsuit even if there may be some doubt on the part of some members of the bar, and if I knew how I would proceed to do so, or to do what you say, but you must first show me and give me a formula to sustain it within the mandate of the statute before I can exercise that pleasurable instinct.

3857 Mr. DIXON. May we suggest first if the principle which we have stated is applicable, and we feel it is, that one of the principles which should influence and persuade the Court in determining what relief is granted should be, that in so far as it is practicable and possible to do so, to restore the conditions of this industry to the status quo ante combination.

The COURT. Is that ever a possibility?

Mr. DIXON. Not one hundred per cent in the sense of the term, obviously no, because you would never—

The COURT. The past result is irretrievable.

Mr. DIXON. Yes, but that does not necessarily mean you may not take such practical measures, assuming they are practical, to effect that purpose and to carry out that principle.

The COURT. Now let us see if we can frame the issue there so we can see it with precision. The defendants suggest, as I gather from their argument, that the objects of a decree under the antitrust law are (a) to dissolve the combination; and (b) to take such additional measures limited by this factor, that those additional measures shall

be only such as may prevent the resumption of the illegal activity or at least to eradicate the force of their continuity. They say that is all you can do. It is an injunction essentially rather than a mandatory direction. You have to stop people from doing 3858 illegal things which they had been doing, and such additional measures are purely ancillary to the accomplishment of an effective halt on the previously illegal conduct. You say that that is not the entire scope of the decree.

Mr. Dixon. That is right.

The COURT. That in addition the decree should attempt affirmatively to recreate a condition which would have prevailed had the illegal steps never been taken and including in that such things as creating the kind of competition which would have been created, and even the kind of business structures which would have existed, had the violations not occurred. Is that right?

Mr. Dixon. In substance that is correct, except with a qualification.

The COURT. Which one of those theories do you contend is sustained by the decisions? And if you say that yours is not sustained by the decisions you presumably argue that logic requires the development of the decisions in that direction. Let us make up our minds on which line you are going to proceed.

Mr. Dixon. Well, perhaps I can take the middle of the road course and say that there are certain statements which, in our opinion—that is, made by the Supreme Court—which indicate what the trend or what the court should do in circumstances such as these, and I have previously referred to—

3859 The COURT. Which is the strongest case that you think supports your view if you feel you are going to rely on authority? One good case is better than a lot of weak ones.

Mr. Dixon. Decidedly. I say that there is no direct authority we can find adjudicating the question that we are discussing here.

The COURT. There is no question that over the past decade the court has been moving in the direction of a stricter enforcement of the antitrust laws. Isn't that right?

Mr. Dixon. That is correct. That is my view.

The COURT. So we are not dealing with a historical

period in which the court is moderating the force of the antitrust laws.

Mr. DIXON. It is really the other way.

The COURT. As in the patent situation, where the courts have been restricting the scope of the monopoly and they have been increasing the scope of the antitrust laws.

Mr. DIXON. That is right.

The COURT. Despite this tendency, which I think has now progressed for more than a decade, the court has not quite reached the point that you now advocate, and you think it is moving in that direction.

Mr. DIXON. Yes, I think that is correct.

3860 The COURT. Now what clues are there, or what language is there, which suggests that that is the doctrinal trend which the Supreme Court has said this court should anticipate?

Mr. DIXON. Perhaps I can only refer to the Crescent case.

The COURT. That is the Theatre Amusement case?

Mr. DIXON. That is right. The decision was December 11, 1944, in which Justice Douglas wrote the opinion of the court. Justice Roberts dissented, and Justices Frankfurter, Murphy and Jackson took no part in the decision.

The COURT. So you had a six-judge court.

Mr. DIXON. That is right.

The COURT. And the decision went in what proportion?

Mr. DIXON. The decision went in favor—

The COURT. No, in what proportion out of the six? How did they divide?

Mr. DIXON. The decision was five to one. So it is clearly a majority of the court. Not like the famous Hartford-Empire case, which was a 4-to-2 decision. This is a 5-to-1 decision in which, as I stated, the opinion is written by Justice Douglas. Now in this opinion the following language is of interest and it is rather short, so I will read it.

3861 The COURT. Before you read it, just refresh my recollection as to what the case held. I remember it only vaguely.

Mr. DIXON. Well, it was a theatre or amusement case and the Government had taken the view that the relief granted by the trial court was not adequate to protect the public interests on the question of acquisitions, and the Supreme Court agreed with the contention of the Government and the decree was modified to that extent. And in

the course of the opinion the court made the following statement:

"The court has quite consistently recognized in this type of Sherman Act case that the Government should not be confined to an injunction against future violations."

As we pointed out that of course is more or less—

Mr. WEBSTER. "Further violations" is the language.

Mr. DIXON. That is right, "further violations."

Mr. HANDLER. It is on page 17 of the memorandum.

Mr. DIXON. "Dissolution of the combination will be ordered where the creation of the combination is itself a violation."

The COURT. Where creation of the combination is itself a violation.

Mr. DIXON. That is right.

The COURT. Does that limit his general language 3862 or is that an illustration of his general language?

Mr. DIXON. Well, in our view it illustrates the general language of the court. Now of course the defendants take the view here that the only time you can have a dissolution or effect dissolution, is where you have a combination resulting from the acquisition of competitive units. And we frankly admit that the cases are all of that character. However, we suggest to your Honor, pausing for a moment to apply reasoning to these cases, to ask the question as to what the difference is, if any, between a case where the combination has acquired the power to dominate and does dominate and control an industry through the acquisition of competing units; or where it acquired the domination and the power by means of being able to, as in the instant case, exclude others from actively being able to compete in the industry.

The COURT. Well, I suppose that Mr. Webster and Mr. Handler would agree that this language would, if the facts warranted, support more drastic action with respect to the stock ownership in the European companies.

Mr. WEBSTER. No, I don't think so at all, your Honor.

The COURT. All right, then I will give you a chance later. If I do not get a concession I will wait until he finishes.

3863 Mr. HANDLER. I think there is a certain ambiguity, your Honor, in the word "dissolution," and if Mr. Dixon would permit, it might be helpful if I pointed that out.

The COURT. Do you want him to?

Mr. DIXON. I would rather finish, if your Honor please.
The COURT. All right, you finish.

Mr. DIXON. There is without doubt perhaps some vagueness or ambiguity as to what the word "dissolution" means in these cases.

The COURT. There it meant divestiture, didn't it?

Mr. DIXON. Yes.

The COURT. Of certain theatre buildings.

Mr. DIXON. That is correct, and in that sense there was not any ambiguity. Dissolution meant divestiture. Now the defendants therefore argue that dissolution as used in the antitrust cases can only be applied to those cases where you are divesting the combination of the companies which it illegally acquired. Witness the cases cited. And that is where we come to the parting of the ways and we submit to the Court that there is no sound reasoning for distinguishing between the manner by which the combination acquires its position of dominance in effecting relief. The important consideration that the public has, or is interested in, is what is the effect
3864 and what can be done to dissipate the effect, and that is the Government's concern.

The COURT. Well, take this language of Mr. Justice Douglas: "Those who violate the statute may not reap the benefits of their violations." That taken literally, tends to support your contention, but isn't that just rhetoric? That does not mean they are really going to be asked to give up the money they made as a result of the combination, does it?

Mr. DIXON. I think that is true. We would not argue that.

The COURT. But essentially I assume these are profit-making enterprises. They are not built up and extended simply pro gloria industrie. It is to earn money. And the benefits of their violations, expressible in terms of money, and I don't know of any case, and I don't suppose Mr. Justice Douglas means, they are to give that up and give it to the consumers. So he therefore adds his language which I suppose should be treated as a clause or limitation upon the generality of his statement when he says to "avoid an undoing of their unlawful project." In other words, that kind of benefit he speaks of means the avoidance of any undoing of their unlawful practice. If that is what that means then even the strongest case does not go to the extent of saying, we are going to shrink down big

companies because they have grown big by virtue of
3867 illegality. Does it?

Mr. Dixon. Well, perhaps you cannot read that into that statement, no.

The COURT. Now let me move a step further, because we have to proceed with the argument. I suppose we could engage in a discussion of it ad infinitum. Assuming that the law is that in an appropriate case you can do what you say should be done here, is this the kind of a case in which that principle should be applied? In other words, what are the criteria when the shrinking down should be done as you suggest?

Mr. Dixon. To specifically answer your question on that point of the case, we submit that it should be done where the obvious position in the industry of the companies involved is such that that fact in and of itself might reasonably tend to deter other companies from coming into the industry or new capital from coming into that industry.

The COURT. Now let us see. Let us hold on a minute. Let us suppose that instead of two companies which we are now dealing with, this was a combination of the four or five big and powerful enterprises, and they had jointly dominated the industry in the sense that those five occupied the fields to the extent of ninety per cent of the consumed products. Now you break up the combination. You sever

3866 the bonds which unite those five. There is no doubt that they had grown big, powerful and rich by virtue of illegal law violation. Would you say that in that case we should shrink each of the five down because in view of the magnitude of those five the chances of new competitors entering the field are not as good, or at least you surmise they are not as good, as they would be if each of those five was shrunk down to half its size?

Mr. Dixon. If you had those five companies in the industry and they were approximately on an equal basis as far as ability to compete in the sense of productive capacity and so on was concerned, customers and position in the industry, I would say that would be satisfactory, the object being to create—

The COURT. Competition?

Mr. Dixon. That is right.

The COURT. What principle of law, or what rule of economics is there which suggests that competition among five is necessarily superior to competition among two?

Mr. Dixon. None, your Honor.

The COURT. There is not any?

Mr. DIXON. That is right.

The COURT. I mean we might without reflection assume so, but the minute you subject it to scrutiny you realize there is no logical support for the assumption that competition among two is any less desirable than competition among five. Perhaps for other purposes it may be that the public has an interest in not having this titanium industry in too few baskets. From the point of view of security in the event of war, or something of that kind, but as far as Adam Smith is concerned, his ghost is satisfied by two as well as by five. Is that not so?

Mr. DIXON. It might well be.

The COURT. Consequently I say to you is this a case in which the principle you advocate should be applied in view of the fact that forgetting the two minor enterprises and there will be a footnote on "minor" with Mr. Whitney saying "minor on the way of becoming major," but excluding the two minor companies you do have two corporations which are powerful without question and undoubtedly neither afraid of the other, and in a position to compete if they only would compete.

Mr. DIXON. Well, obviously your Honor forces me to the position of answering no. I mean in the sense that we could probably have effective competition from only two companies if they were in the industry.

The COURT. When you say I force you to a decision—

Mr. DIXON. I mean logically you have, because there are conditions under which that might well be the case. We do not think that the principle applies necessarily to antitrust cases, and that brings me back to the point that I was urging for this requested relief. That you cannot look at it alone from that point of view, but should apply—but if my premise is wrong why then my relief should be denied.

The COURT. We might conceivably come over to your proposition within the narrow scope of the ancillary relief we discussed before if we said that although it is true that competition could prevail as effectively between two as among five, where you have the situation where there had been no competition between two, then you cannot rely upon that competition developing and that you must have power to stipulate, but don't forget in this case the finding is unique in that you have a situation there was competition between the two. Maybe that finding is not justified and maybe it is not true, but I do not remember the Government protesting or urging I should find there was no com-

petition between the two, so therefore the so-called ancillary relief which is sometimes granted to dissipate the force of inertia is here in this peculiar case least likely to become necessary.

Mr. DIXON. Well, of course the word "competition" as used in our findings read in a general sense may have a variety of meanings.

The COURT. Undoubtedly.

Mr. DIXON. And "competition" as defined, as the 3869 findings found in this case, is confined principally to a contest to serve customers, in substance, and the product competition certainly was eliminated from the picture in view of the fact that both companies had access to all the patents and patent applications of each other, so in that sense we have a restricted type of competition here, if you want to call it competition, and it properly can be so described.

The COURT. Well, any competition. We do not have the absence of competition which affects adversely the interests of consumers. That is what you have to concern yourself with. In other words, the fact that they did not compete with each other in their productive processes, assuming there was no violation in the sense it excluded others than themselves, insofar as they did exchange it was a benefit to consumers. Let us not over-look that. In other words, as between themselves the condition of non-monopoly in the art existed which would have existed if there were no patent system, which of course would be desirable on a short run anyway from the point of view of consumers. So when you say there was a restricted competition I may go along with you, but it was not the kind of restriction which adversely affected the interests of consumers. There is where perhaps we get into the question of speculation.

3870 Mr. DIXON. The Government would take the position, your Honor, that it does not necessarily follow that because you have this type of competition found to exist in this case, which may or may not be beneficial to the public, that is not proof that the public would not have been better served with perhaps a better product and a lower priced product, had the combination not exercised the power which it did exercise in this case.

The COURT. That is not a supposition. Assuming we start with decided propositions which I have decided, and as far as I am concerned I do not intend to go back of that; in other words, we have already concluded that it was

harmful in the sense of colliding with the policy of the statute. I am not here to pass upon the ultimate economic fact today that to do what the defendants did because they excluded the whole world outside of their particular enterprise, and insofar as the world was already restricted to the extent it was within that restricted world, whether to that extent it was a benefit to consumers rather than an injury. In other words, this exchange in itself, in its limited sphere, did promote and advance the art in its limited sphere, and the criticism of it is that it was a limited sphere, not that it was an exchange. If this were a universal system of exchange nobody could have criticized it; isn't that true?

3871 Mr. DIXON. It is possible. Well, that is the reason for going back to our position as to the request for dissolution here on the principle that we feel that insofar as practical to do so that the status quo ante should be restored.

The COURT. Now that is an important proposition and I would like to know whether or not it is supportable either by authority or by reason; that the object of the antitrust decree is to restore the status quo ante. I wish you would focus your analytical powers upon that, because I have an open mind on that.

Mr. DIXON. The only thing that I can add to what I have already said, your Honor—I am frank in making the statement to your Honor—is to again refer to Justice Douglas's opinion in which, as we view it, he states a cardinal principle of equity here when he says that those who violate the act or the law may not reap the benefits of their violations. Now we might put a period there. There is not one—

The COURT. If you put a period there, it would be a universal which could be so readily riddled that it would not stand up very long.

Mr. DIXON. That is true.

The COURT. So therefore you cannot put a period there.

3872 Mr. DIXON. But he does state a principle of equity which would seem to us to be applicable to antitrust cases. Now let us assume for the moment that it is applicable. On that premise what could a court of equity do? And there we submit that in this case the court should, in so far as it is practicable and possible—within those limits of course—endeavor to restore the parties to the status quo ante position.

The COURT. Of course your decree would do nothing

of the kind, you realize. Your decree would not at all restore the status quo ante. It would create a condition which man has not yet seen, namely, the existence of four enterprises which have had no prior existence either in fact or in human contemplation.

Mr. DIXON. That is why I said "in so far as it is practicable."

The COURT. Now which ante would you go to in order to find the status that you would restore? Would you go back to 1920?

Mr. DIXON. No.

The COURT. And recreate National Lead, Titanium Pigment, up in Niagara Falls, and Mr. Jebesen's laboratory? Of course when we use the language, status quo ante, even assuming it is a valid principle, that means this: A and B have combined illegally. We undo it and we restore the status quo ante, namely, A is in his own corner and B in his. Therefore in these cases you do not have to

3873 really resolve these troublesome questions we have been dealing with here because the proposition is ultimately another proposition which is unchallenged.

Here we have a proposition which is not equal to another proposition which is unchallenged. "Status quo ante" here leaves us no place. I don't know where I should go to. It really is an absolutely unpointed direction to say

"We are going to restore the status quo ante," because the direction yields no point of reference, and in fact as

I read your decree you do not propose to go to any status quo ante. Therefore it seems to me that the principle of restoring to status quo ante is not a useful tool in anti-trust law, and that we must find other criteria which are

more relevant to the social policies which Congress intended to be enforced. I take it that that social policy is in briefest terms, the elimination of man-made obstacles

to the free competition system. Now if that is so, we go back to the question we had yesterday, whether in achieving that the court can go further and undertake the task

of the entrepreneur, namely, the establishment of business enterprises, the allocation of capital, equipment, personnel,

market product, all the things which in the aggregate make a living business. Can a court undertake that task, assuming that it would be a good thing to have it done?

Is it equipped to make an acceptable judgment on those questions? It may be that that is what the Congress intended the courts to do, although I am frank

3874 to admit that I would approach the solution of that

kind of a problem with great trepidation, because I seriously doubt that the evidence in any antitrust case ever provided a court with the data, and I am sure that his experience does not provide him with the necessary judgment and experience to authorize him to risk other people's money on his conception of what will be a successful business enterprise, and that is what you really get down to.

Mr. DIXON. Well, we, of course, would not want to put the court in that position at all, and we would not, on the question of the requested relief along the lines we have been discussing, require the court to do that. We had, as the proposed decree provides, indicated that the defendants should submit a plan as to how that could be done, and so forth.

The COURT. In other words, you wanted them to make a suggestion. That is all that amounts to. Well, the responsibility has to be the chancellor's.

Mr. DIXON. In the last analysis it would be. Subject always to being proved to be a practical proposition. We are not asking the court to do something here which would require it to operate a business but merely to create the condition where, assuming someone else was interested in buying that business, they would have the opportunity to do so and thus thereby further guarantee effective competition.

The COURT. Back in 1920 a group of statesmen, not sitting as a court but as a tribunal, attempted a thing like that and they dissolved an enterprise and created a new one called Austria, but it turned out to be an unsuccessful enterprise and did not have apparently the economics sufficient to sustain it. Supposing I say that the St. Louis plant of the National Lead Company—there is one, isn't there?

Mr. WEBSTER. Yes, there is.

The COURT. If there is another one, I have forgotten it, but the St. Louis plant should be set up as an independent enterprise. Well, what are its relations to a source of ilmenite? Shall we leave the source of ilmenite with the St. Louis plant or shall we leave the source of ilmenite with the New Jersey plant, or shall we split this ilmenite source and give it half to St. Louis and half of it to New Jersey? And now let us go a little further—

Mr. DIXON. May I interrupt to say we would not expect

to even ask the court to venture into such a determination.

The COURT. I would have to do it sooner or later.

Mr. DIXON. Why?

The COURT. Because I assume if I went through 3876 with your suggestion Mr. Webster would come along with a suggestion as to how we would do it and unless Mr. Webster has ceased in the art of advocacy and is acting here as a special master, which I take it he is not being paid to do, he would come in with a proposal which would best serve the interests of his clients, not necessarily the best interests of the Department of Justice, and disputes would arise. Conceivably he might come in with one enterprise which is practically a gilt edged proposition and likely to succeed, and another enterprise which would turn out to be a shell and in the private judgment of the company would be one of those things which would just collapse after a little while like one of the misfortunes of war.

Mr. DIXON. It might well be, your Honor, that might be the result. My point is all we are asking the court to do is to provide the opportunity, assuming someone wants to do it—that might be a bridge to cross—but all the Government is interested in here in trying to accomplish is, assuming someone might want to buy the St. Louis plant, to use your Honor's example, and it was a shell that is set up, that would be their business risk. It might turn out well. It might turn out a complete failure? The question of whether or not someone would buy it would be the question. Now with that the Court is not to be concerned except in so far as under the plan naturally the 3877 Government, assuming it were operated, would be interested and want to know who was buying the plant.

The COURT. And of course I would have to make sure they are setting up a salable parcel, because they could frustrate the purposes of the decree by offering something which was utterly unmarketable.

Mr. DIXON. That might well be true. The test there would be, insofar as the Government is concerned, as to whether or not there was any desire on the part of anyone, any new capital as such, to acquire the plant.

The COURT. Tell me this, is there any experience which the Department of Justice has had, or the courts—the Department of Justice has signed hundreds of consent decrees which is a formal administration of the antitrust law—is there any recorded instance in which fission, to

allude to the atomic history, fission took place where there were not pre-existing seams "to open up?"

Mr. DIXON. I would hesitate to answer that question, your Honor; without talking with someone who handles the consent decrees section, or the consent decrees in the division.

The COURT. What I am afraid is, you are asking me to do surgery, and surgery is a risky business. It is a much different and a much simpler task to take apart that which man has put together, but to cut living tissue is
3878 risky enterprise.

Mr. DIXON. That the Government is not interested in doing either, your Honor, obviously. The proposition we are arguing here and urging the court to consider is based on the assumption that it is possible and practical to do it. If our premise is wrong, then the relief should be denied, because otherwise the Government would not be requesting it. We are going on the assumption that this industry—perhaps it is a matter that the court would want to hear some evidence on, and if it developed that it was impracticable to do that urged by the Government, then the Government would be agreeable to finding that that was not the best way of effecting relief to this industry. I am discussing the principle.

The COURT. I understand. That is what I want to get, and the principle is what?

Mr. DIXON. And the principle is, we are submitting it to the Court, at least our point of view that it would not require the Court to do the things which your Honor has rightfully feared perhaps he might be forced to do in carrying out such proposals as are urged by the Government in this request for relief.

The COURT. These problems that we have been discussing do not really apply to the requested disposition of the stock of the British Company, Canadian Company, French Company, and I assume all of that
3879 stock is held through Tinc—

Mr. WEBSTER. Not all of it, your Honor.

The COURT. Some by NL?

Mr. WEBSTER. Yes.

The COURT. Well, in any event BTP is an enterprise and we have become accustomed to the slight flow of ownership and presumably when some of that stock was held by National Lead or held by International Smelting it would not make any difference to the enterprise as a going concern. There the question is more directly related to the

problem as to whether that is a necessary step in giving effective relief. But here you have got an additional problem when you are dealing with the domestic scene.

Mr. DIXON. That is why I indicated to the Court that if it should develop on a proper showing that the proposal urged here by the Government was not practicable or feasible, I want to make the statement here now that we would be the first to say to the Court that that was not the type of relief we would ask the Court to go along with.

3880 The COURT. Let me ask you this, Mr. Dixon, — Mr. DIXON. Yes, sir.

The COURT. —as far as the distribution of the foreign stocks are concerned, is that founded upon the belief that that is necessary in order to prevent by reason of continuity of previous association the continuance of a policy of restrictive imports and exports, or are there some other bases for that request?

Mr. DIXON. That is the principle, your Honor. There are, of course, what we might call incidental reasons flowing from that, such as the doing of those things which will make more certain the recreation of the relationships. As we pointed out yesterday, we have a most difficult problem here at the very best in dealing with the foreign companies.

The COURT. Yes. And in the other situation you have a more difficult problem.

Mr. DIXON. Yes, sir. We are dealing with stock. I mean it is an easy matter to say that the stocks should be sold and to whom it should be sold and so forth, because you are only, figuratively speaking, dealing with a piece of paper that represents control.

The COURT. Yes.

Mr. DIXON. However, in the divestiture proposition you are dealing with physical assets.

The COURT. Yes, that is right.

3881 Mr. DIXON. And the piece of paper which would represent that asset after the corporation would be created would be the thing that would be sold there.

The COURT. Yes.

Mr. DIXON. But, as I have indicated, we are arguing principally now on the assumption that it is feasible and practicable, and if evidence should develop or be submitted, assuming that your Honor sees fit to go into that phase of the requested relief, as I have indicated before, the Government would upon such a showing clearly state to the Court and state to you that we felt

it would not accomplish the desired result.

First we say that the industry involved here is particularly adaptable to that type of—

The COURT. Division.

Mr. DIXON. Division. If it were wrong and the showing should be made that we are wrong, we would not ask this Court in the exercise of its discretion to order that kind of relief. We feel, however, that it is feasible and practicable to do it.

The COURT. Would you be prepared to proceed to prove that? After all, the affirmative would be yours on an issue of that kind.

Mr. DIXON. Well, we would call first the defendants.

The COURT. Themselves?

3882 Mr. DIXON. Yes, sir, themselves, to prove that fact. They are the ones who have the most knowledge concerning this business, and on that basis, of course, we would submit the evidence to the Court for its further consideration.

The COURT. All right. Mr. Webster, Mr. Handler, or any one of you who desires to enlighten me on this subject, I shall be glad to hear.

Mr. DIXON. Pardon me, your Honor. I see that I have the language here of the Supreme Court in the Standard Oil case, to further indicate what I have in mind. On page 278 of 221 U. S. where the Court, as we pointed out in our brief, discusses the relief, says:

"The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

Now that is the sort of thing—

The COURT. Yes, but there are a number of cases and I thought you might cite those when you were discussing or talking in terms of power. There are quite a number of cases and I daresay that was one, but I think the tobacco case takes the position or talks ostensibly in terms of power.

Mr. DIXON. That is right.

3883 The COURT. Of course, that is a very adjectival word.

Mr. DIXON. After all, your Honor, what is power? Power is nothing more than the position of

these companies in the industry, the customers that they now have, plus the goodwill of those customers.

The COURT. Yes.

Mr. DIXON. That is all power is.

The COURT. But you talk about dissipating that power, and then if you go out and represent what they did to dissipate it you have a different problem.

Mr. DIXON. That is right.

The COURT. Is there anyone else who wants to speak?

Mr. DIXON. Pardon me, your Honor. Mr. Jacobs has suggested that our position perhaps ought to make clear, if it is not already clear, to the Court on the patent situation, on the compulsory licensing phase of the case, and your Honor has previously stated the proposition as to our taking that view for the purposes only of the record. However, we do urge and submit to the Court—

The COURT. Just a moment, please.

Mr. DIXON. Yes, sir.

The COURT. You mean the free licensing?

Mr. DIXON. The free licensing as such.

The COURT. Which has so far been held to be improper.

3884 Mr. DIXON. That is right.

The COURT. Let me ask this question that I meant to ask you yesterday—

Mr. DIXON. Yes.

The COURT. What argument is there to be made in opposition to the proposition that if compulsory or free licensing is to be granted, that a reciprocal obligation from the beneficiary of that privilege should not be exempt?

Mr. DIXON. Well, I can very well visualize vehement opposition to such a proposal by even the present companies in the industry who would regard it as bringing about a difficulty with which they would be faced, or a condition imposed by the Court as a requisite to their receiving the license.

Mr. WHITNEY. I have to object to that evidence, your Honor. I will have to object to the witness as not being qualified.

The COURT. I want to know why shouldn't they be exempt.

Mr. WHITNEY. He is taking advantage of the situation when he speaks of there being such companies in the industry. After all, there is one sorehead in the industry,

and I do not want that statement going into the record.

Mr. DIXON. What was that?

Mr. WEBSTER. He said there was a sorehead helping you.

3885 Mr. WHITNEY. Your Honor, just so there will be no misunderstanding, because I really did not mean to interrupt—

Mr. DIXON. That is all right.

Mr. WHITNEY. —but I feel in this particular instance I was justified. All I mean is this: I take it that your Honor is asking questions of a general character but essentially legal in content, and the reason I interrupted brother Dixon is because the reply was exclusively evidentiary in character.

The COURT. Very well. However, assuming that such was the fact, but I do not take it as a fact, and that is because I am not receiving evidence at this time, but assuming that the prospective beneficiaries of a free grant do not like it, is there anything by which they can justify their disaffection?

Mr. DIXON. As to that I am in no position to state, your Honor, I don't know.

The COURT. Well, is it a fair thing to do, or would it defeat the purposes of the statute to exact such a condition from them?

Mr. DIXON. I can see where that may be argued, and that was the argument made by the defendants during the course of this trial, that the whole combination or purpose was to permit the industry—

The COURT. After all, there is nothing to prevent Webster from making a private agreement for an
3886 exchange. I mean it is the lesser of the greater evil.

Mr. WEBSTER. We found it was quite successful.

The COURT. That is, an exchange which has a very limited relationship in comparison to making a universal exchange.

Mr. DIXON. May I ask this question? I do not understand whether your Honor was thinking along the line of having this on a royalty-free basis.

The COURT. Assuming royalty-free, why shouldn't it be perfectly proper, assuming royalty-free, that if Virginia Chemical wanted all the National Lead patents free, that Virginia Chemical should offer National Lead an equally free license on all of its titanium patents?

Mr. DIXON. I can see where that might have considerable merit, your Honor.

The COURT. And if it is on a stipulated control, modest royalty but compulsory, and if Virginia Chemical wants access to the du Pont patents, why shouldn't du Pont have the advantage of all the Virginia Chemical patents? Otherwise you will arrive at a situation conceivably where Virginia Chemical would simply change places with du Pont in becoming the dominating factor in the industry under this extraordinary advantage of being able to take everything for itself and keeping everything that it has.

Mr. DIXON. Well, if I understand your Honor's 3887 question, it is directed to the granting of royalty-free licenses by the defendants?

The COURT. No. I am suggesting it on both premises.

Mr. DIXON. I understand, or, in other words, to anyone who wants the use of these patents on a reciprocal basis.

The COURT. Of course, a new man going into the industry, probably he has not anything to offer anybody in return.

Mr. DIXON. That is what I was about to come to.

The COURT. Ordinarily he would have nothing, but if he has it should he keep it as his exclusive property and get everything that his competitors have? There is a vast difference there.

Mr. DIXON. That is the situation that I was coming to, that someone else might come into the industry with no patents and he might be perfectly willing and probably would to assume that reciprocal obligation, and it might well be that the Government would be satisfied with that kind of arrangement, because here the ultimate purpose of this whole case, which has taken so much of your Honor's time and the time of everyone else, is to open up this industry to be certain that it is free and competitive and upon an equal basis, and so that there are no disadvantages foisted on anyone who wants to go into the industry, 3888 and on the suggestion that your Honor has made the Government might very well be receptive to it.

The COURT. Now I assume that if there is a time limitation on the one hand, so that all patents up to midnight of a certain date are subject to this compulsory licensing on the one side, maybe the same patent invitation ought to apply on the other side, but let us put it this way: At this moment I am unable to contrive an argument which has plausibility as to why it should not be done, and that is why I asked about the Hartford-Empire case, and the

answer, of course, was effectively given that in that case you were dealing with a purely licensor organization which had no use for patents except for the control of licensing, and consequently there would be no benefit to it in receiving such cross-licenses.

Mr. WEBSTER. You also had a different kind of case involving different kinds of businesses. Some people were making bottles; some people were making flat glass and all that sort of thing.

Mr. DIXON. We are exploring the field here on the question of relief as well as the law, which is, in the opinion of the Government new in the sense as we have pointed out concerning which there are no adjudicated cases, and we have an open mind in the sense that our sole purpose here is to accomplish for this industry that which will be

best in the general interests of the public, and what-
3389 ever will best accomplish that is what the Government wants.

We have submitted the decree in the form in which we feel that the desired result will be most effectively accomplished and, of course, have based our arguments and statements in support of that decree.

The COURT. I have found this argument very instructive. I had not really given as much thought to this problem previously as I have given to it in the course of this argument, which has crystalized a number of issues in my mind.

All right, Mr. Handler.

Mr. HANDLER. If your Honor please, adding anything to the discussion at this stage of the case would be almost like painting the lily. However, there are just one or two comments I would like to make which may be of some assistance.

The COURT. Yes.

Mr. HANDLER. I think a good deal of the obscurity that has entered into the Government's argument is by reason of the ambiguity of the term "dissolution", which has a much wider meaning than the divestiture of physical property or the divestiture of stock.

An antitrust decree may take two forms; the negative form of restraining future wrongdoing and the affirmative form of undoing the wrong which has been committed. When the wrong is undone we speak of dissolution, and dissolution arises not only in the cases involving
3390 fusions or capital combinations, it arises in cases involving loose arrangements, so to speak, among

legally independent competitors. However the dissolution prayer may come up, it seems a remedy and not a punishment, and a remedy which is granted very cautiously and with extreme reluctance by the courts only on to most clear and convincing showing that this far-reaching remedy is necessary to undo the wrong.

For example, in every Trade Association case, where a trade association indulges in price fixing, the combination of territory control, the control of production, or similar activities, principally the exchange of statistical information involving the Sugar Institute and the Maple Flooring Lumber cases, for example, the Government traditionally will request dissolution of the trade association, and that is only granted when the Court feels that the wrongdoing has so thoroughly permeated the association that a negative restraint upon the indulgence in the activities from which a violation of law is spelled out will be insufficient.

Similarly, where the suit involves the legality of a contract under the antitrust laws, which is really the heart, or at least one-half of the present litigation, the Court has to determine whether the wrongdoing has permeated the entire agreement. If it has not, and if surgery is advisable, the Court will merely restrain or excise those portions of the agreement in question and permit the agreement to stand.

3891 Likewise with the patent pool, if the patent pool is possible of lawful continuance, the Court will eliminate from the pool those practices which are obnoxious and permit the pool to stand. But, and this is the important consideration in every case in which dissolution is sought or has been sought in the past or can be sought in the matter of logic, having regard to the nature of the statute, its structure and the purposes of dissolution, the dissolution is directed against the wrongdoer. That is why it is so important to point out that where you have property divestitures, and where the original acquisition of the property or the stock was unlawful, then dissolution is an appropriate remedy having regard for all the circumstances of the case. It is an appropriate but not a necessary remedy to undo the wrong, to wit, the acquisition of the property.

Now, here the wrong consisted of two things: The international cartel based upon the agreement and the patent pool. Both are being dissolved. The wrongdoing

is being undone. Extrinsic to the dissolution, the undoing of the wrong, the Government comes in here and seeks to have divestiture of property and stock.

Now our proposition is that under the cases there must be an antecedent finding that that which is dissolved stands in violation of law. You do not dissolve something which is inherently lawful unless you desire to
3892 punish the parties for their extrinsic violation.

Now if you consider the structure of the statute and what the courts have had to say about the nature of dissolution, it becomes perfectly apparent that dissolution may never be asserted in such a case as this, but the Government, because it has won a victory here, imposes certain conditions upon the defendants as a punishment for their having been bad boys.

Now, in the history of the statute, numerous suggestions were made on the floor of the Senate where the principles adopted have far-reaching sanctions and include punishment of a most onerous character.

The original bill introduced by Senator Sherman did not have all the sanctions which are contained in the present law. Now the structure of the statute is very interesting and I think most illuminating. The statute imposes punishment for wrongdoing in the form of a criminal penalty. It provides a remedy for disgorging all profits made for wrongdoing through an action for treble damages, and it is interesting to note that in the course of the debate a proposal was made to permit the union of suits of agreed victims of a conspiracy in order to further effectuate the purposes, and that provision of the statute was rejected by the Congress, and they provided that the aggrieved individual must sue by himself to recover his damages which then may be trebled by the Court.

You have a provision for forfeiture of the property in movement in interstate commerce used to carry on the conspiracy. The Congress was not unaware of it or of the potentialities of the remedy of forfeiture, and as a means of implementing the statute they adopted forfeiture, but they limited the forfeiture to one thing, to wit, the forfeiture of goods moving into interstate commerce.

And then they went on to provide that a court of equity might enjoin violations of the statute. The wording of the statute there is very narrow and we, of course, make no point of that, because there have been 55 years of con-

struction of the statute, and the equity provision has been given a very broad construction, having regard for its purpose, to wit, remedying and undoing a wrong.

Now, the suggestion has been made that the cases that limit the relief in equity are legal antiques which are not entitled to any weight today, which suggestion seems to me to be quite unfounded, because the latest word on the subject is the decision in this circuit of the Circuit Court of Appeals in the aluminum case, which your Honor well pointed out before, and there Judge Hand stated:

"Dissolution is not a penalty but a remedy. If the industry will not need it for its protection it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency."

Now the opinion in the Crescent case does not 3894 affect that statement of Judge Hand's in the slightest. On the contrary, it supports everything that has been said by us.

There Justice Douglas pointed out that dissolution has been afforded in cases involving capital combinations, and manifestly if a group get together, as in the old Standard Oil and American Tobacco cases, and build up a trust or monopoly, an integration, or fusion, the only way to bring about a condition honestly in harmony with the law would be to split up the trust into various segments, and that is what was done, and that is all that Mr. Justice Douglas means in the sentence which was called to your Honor's attention by counsel for the Government, "the undoing of their unlawful project."

In other words, dissolution is never ordered unless that which is being dissolved is in and of itself unlawful.

Now as to the question which your Honor asked as to whether this point has ever come up, I think the answer is in the affirmative. It came up a fortiori by implication in the Hartford-Empire case. There you had acquisitions which in and of themselves may have been considered unlawful, and despite the fact that you had acquisitions, and you had, as Mr. Whitney pointed out so well yesterday, the most flagrant type of antitrust violation, indeed there is no violation of the antitrust laws that has ever been reported in any of the recorded cases that you can't find in the record of the Hartford-Empire case. That constitutes

3895 the real textbook of antitrust violations. Despite that, however, no dissolution was even ordered of the acquisitions which might arguably have been said to have been unlawful. This record, of course, is entirely barren

of any acquisition which can be so claimed either of property or of stock.

Now your Honor has raised the question about the use of the concept of power in the antitrust cases in which dissolution has been decreed. There, of course, Congress had in mind the source of the power, the essential wrongdoing of the acquisition. The source of the power there is the absorption, the fusion of the case into one legal entity. Here the source of the power such as exists as between du Pont and National Lead is the agreement, the horizontal agreement between the two companies.

You have to sever the two companies, and you are going to enjoin that agreement. You are going to enjoin them from ever making another agreement of the same character. The vocal cord has been severed, and the power has been completely destroyed.

You have gone much further than that, and I think that this phase of the case has not received the attention from the Government that it deserves. Here we have two American companies that have engaged in this patent business or international cartel, and by the same token you could

have one American company. And I think that 3896 would be the more orthodox pattern, because we are dealing here with companies whose power stems from the patent laws of the United States. They obtained patents, a great many of them.

Now, your Honor has found after a lengthy trial that those patents were used wrongfully, and you would have the choice here of either restraining the future wrongful use of the patents, which would follow the orthodox procedure of the decree, or you could go further, as was done in the Hartford-Empire case, and shear those patents of all of their monopoly advantages by making them available to everybody.

Now, the impediment that arises in new competition in this industry in the past has been the lawfully-granted monopoly in the patents, coupled with the improper use of that monopoly by the defendants.

Both are going to be destroyed by the decree. The lawfully-granted monopoly will be aggregated to the compulsory license, and the wrongful use of the patents will be interdicted by the restraining clause of the injunction.

Where does this concept of compulsory licensing stem from? It was never ordered in any antitrust case prior to the Hartford-Empire decision, but in a sense the Hartford-Empire decision goes very much beyond any-

thing that has ever been decreed in any antitrust case, because they did more than dissolve the wrongdoing. They actually destroyed a monopoly which was conferred
3897 by law by opening all the patents to the industry.

Well, it is perfectly apparent that compulsory licensing, which was used as the underlying principle in the decree, came from recommendations that had been before the Congress for many years. The Anti-Trust Division had recommended to the T. N. E. C., as did other agencies of the Government, that compulsory licensing of all patents be adopted by Congress, and that a restraint be put upon patentees in the restrictions that they might impose upon licenses, and those restrictions were in general put in the Hartford-Empire case, and they are not involved here.

The basis of compulsory licensing is that everyone is put on a parity in the industry. The legislative proposal would not differentiate between A and B. For example, if A goes to B and asks for B's patents, by the same token B is entitled to go to A and ask for A's patents, and the decree as proposed by the defendants would not be imposing any obligation on a new company in the field, because obviously not being a party to the cause, it is more or less put in the position where if they want our patents they must allow us their patents if they have any.

The COURT. Just one point on which I should like a little more light from you.

Mr. HANDLER. Yes, sir.

The COURT. As to the stock ownership in the foreign field, wouldn't that be said to have been a wrong-
3898 ful acquisition in the same sense in which Justice Douglas speaks in the Crescent case, that it was part of the proof of the conspiracy? In other words, the stock acquisitions were part and parcel of the territorial allocation agreements, and probably were a necessary element in the establishment of the territorial arrangement. Now why can't it be said here, and whether it should be said is another matter, but why can't it be said that it is within the scheme of dissolution that you have defined?

Mr. HANDLER. Your Honor is entirely correct when you state to the Government that a divestiture of stock in this case would not raise the problems of practical conveniences that are suggested by the proposal for the divestiture of a physical plant. And, of course, it follows the orthodox pattern in the sense that there is judicial prece-

dent for ordering a divestiture of stock, but the initial acquisition and use of that stock must have been in violation of the antitrust laws.

Now our position is that the initial acquisition of this stock, and in many foreign companies the acquisitions of the stock were of wholly-owned subsidiaries, or a subsidiary having the controlling interest in a sales company, but in the case of where the plants are held by competitors or where the stock is held by the general public, we say there is not any question but that those stock acquisitions are entirely lawful.

3899 The COURT. I am concerned principally with those cases involving incidents of stock distribution being part of the treaty, and where the treaty included the scheme of exclusive territorial allocations and the principle of non-competition. Now why can't you say here or why shouldn't we say that the stock acquisition was a wrongful act in that sense?

Mr. HANDLER. Well, I would say that the wrong consisted of the cartel agreement, not the acquisition of the stock, and if you mean—

The COURT. Have you seen the agreement? It is all one agreement.

Mr. HANDLER. Yes.

The COURT. The stock is allocated. The structure is prescribed in one master agreement which refers to subsidiary agreements as implementing the major decision.

Mr. HANDLER. But that would not mean that every term and provision of the agreement was necessarily wrongful. The stock acquisition and distribution may have been part of the original plan, but the vice in it was the territorial restriction. If there had been no territorial restriction and if National Lead had collaborated with the three British companies in establishing BTP, our position is that there would have been no violation of law, but that is all there was.

Now in terms as to the efficacy of the decree, the
3900 divestiture will clearly show a very great and a serious financial loss to National Lead, and this argument is addressed entirely to your Honor's discretion.

The COURT. Yes.

Mr. HANDLER. The losses of National Lead have to be measured against the possible gains. We have gone into that in our brief, and we feel that if a balance is struck

it is perfectly apparent that the gains are hypothetical and negligible whereas the losses are actual and clear.

The COURT. That about the idea of the ancillary support of the decree? After all, if National Lead owns 40 per cent of the stock of the foreign companies, the chances of the foreign company ever actually being in competition with National Lead would be very slim, aren't they, assuming that they could be in competition with no tariffs, no patent problems, and assuming that you were in open competition?

Mr. HANDLER. That is not the situation of course.

The COURT. No, that is not the situation.

Mr. HANDLER. If it were contended that such were the situation, why, it might be different.

The COURT. So the argument is made that even if we create the most fruitful area for such competition, they would probably be operating at a minimum anyway and the social advantage would be very small.

Mr. WEBSTER. Without qualifying in any way 3901 what Mr. Handler has said, after all, those of us who have lived through the trial of the case and who have examined these agreements over and over again, perhaps in fairness to your Honor should talk about that.

I don't think we can say at the end of this case that the stock acquisition in the foreign companies was not connected with what your Honor has found to be a violation of the Sherman Act. And the agreements, like the British agreement, the German agreement and the Canadian agreement, all involve the application of the famous paragraph 14 of the 1920 agreement to those other agreements. Indeed, the premise of the promotion in each instance was the existence of the 1920 agreement.

The COURT. That is right.

Mr. WEBSTER. And, in fact, the 1920 agreement, if your Honor strikes down the foreign agreements, will still rise to embarrass us abroad, because it was inextricably tied up with the obligations that were assumed by our foreign associates.

Furthermore, I think that to be perfectly candid with your Honor, and in line with what Mr. Handler said, it would be appropriate in the exercise of discretion not only to cancel those agreements to the extent that your Honor has jurisdiction over NL and Tinc, and to require NL and Tinc to dispose of the property which has been

acquired and used in connection with a decided violation of the antitrust laws.

3902 Now really what it comes down to is this: If your Honor believes that by reason of the striking down of the cartel as such by dissolution of the combination between DuPont and National Lead, by putting National Lead and Tine under very severe injunctive provisions with a reservation of jurisdiction such as to permit further attention to this subject if there is occasion for it; with the power of the Court to punish for contempt—let us hope there will never be any contempt—but with the reserved power which is undoubtedly a sanction of great importance; that in the present very uncertain condition of international trading and the general policy of the United States to encourage American companies to engage in business abroad, that your Honor should tolerate a continuation of stock ownership which is not palpably unfavorable to the interests of the United States and which can if necessary be policed to prevent future violations.

Now to be sure there are practical problems which we can't blink here. We have been here altogether much too long to attempt to do that. I think that with the tariff and the freight situation, and the great demand in the British Empire for pigments, it is not very likely that BTP will come shooting over here with pigments and compete with the National Lead Company; and with the great pent-up demand for pigments in the United States and the growing consumption and use and
3903 preference for titanium pigments over other types of pigments, and with the freight rates and the British tariff features, I do not think that it is likely that we will go running over to the British Empire and engage in this line of commerce.

Now, furthermore, there is an argument of expediency, frankly so, which we should like to have your Honor take into account in exercising your discretion, and that is the British agreements were set up on a partnership basis. To be sure, too, they were set up on a basis which gave our British partners and our Canadian partners very substantial rights in the event that one party or the other should withdraw. Indeed, those restrictions are embodied in the articles of association of the foreign companies, and they would presumably like to continue to have our goodwill and perhaps our patents, and perhaps our know-

how. And I assume that it will be possible over a period of time to negotiate reasonable changes in the existing situation which would be subject to the Court's approval. And, therefore, what we really ask is that you permit us to continue to hold the stock in the British and Canadian companies.

The COURT. Do they have an option to buy that stock if you are offering it for sale?

Mr. WEBSTER. They have the right to buy the stock at book value.

The COURT. At book value?

3904 Mr. WEBSTER. At book value.

The COURT. Is that true of the Canadian as well as of the British?

Mr. WEBSTER. Yes, that is true. Now, of course, the book value refers only to BTP and CTP and the companies just got a start just before the war, and it now has a value vastly greater than the book value, and it would be a distinct sacrifice and indeed a destruction of the property.

The COURT. I suppose as to the Canadian situation, it can really be said that they have practically nothing up there.

Mr. WEBSTER. Well, we have no—

The COURT. Plants?

Mr. WEBSTER. Interests in a plant. On the other hand, we have an obligation under our present agreement with the Canadians to assist in financing a Canadian plant. There is an interesting possibility, and I do not mean to complicate these practical problems, but if your Honor were to require us to cancel the Canadian agreements, there is a situation that might arise in connection with duPont's interest through CIL and Canadian Titanium Pigment Company that might affect future licensing. It would not serve the interests of the United States to have the National Lead Company simply as a matter of antitrust enforcement restrained from doing any business outside of the United States or have any beneficial relations
3905 with foreign companies. That is just a thought and

I have not meant to complicate the problem.

The COURT. No, I think that is a necessary thought. However, does anybody else want to add anything?

(No response.)

The COURT. Well, I think we have reached the point in the discussion where we shall have to get down to a

discussion of words and phrases. However, I was just wondering whether this is the most convenient way to do that, or would it be satisfactory if we did what we did with the findings? That is that I study your briefs, the cases, and the various suggestions which are made, and then have a draft prepared before the time we meet again.

Mr. WEBSTER. I think that would be an excellent suggestion.

The COURT. And while we are here I suppose I ought to state to you that there should be some reflection on my part in connection with the various statements which have been made here.

Mr. WEBSTER. I think your Honor's suggestion is excellent, and if your Honor on the basis of the discussion and the briefs outlines the basis on which he thinks a decree should be drawn, we will then be able to make progress very rapidly, or perhaps more rapidly than we would if we were to sit down together immediately.

The COURT. All right. You are going back to 3906 Washington, Mr. Dixon?

Mr. DIXON. I am here, your Honor, as long as you want us to stay, but I merely want to say in passing, first, that we are naturally anxious if possible, subject to the time and convenience of the Court, to get the matter in final form at the earliest possible date, which I am sure is the like purpose of the defendants.

The COURT. Well, my problem is that I have to dispose of this before the 12th or not dispose of it.

Mr. DIXON. Well, that is the answer then.

The COURT. So that I do not have very much time to reflect on it. However, I think the discussion has been very helpful; and there is no doubt in my mind that it is going to crystallize some of the problems.

(Discussion off the record as to adjournment date.)

The COURT. Tuesday, October 9, at 2.15. We will meet right here. I won't promise you that I will give you a draft in advance, as I may only be able to give it to you then. However, after all, we are dealing with a relatively short document.

Mr. DIXON. That is right.

The COURT. And I should not think that it would be too difficult.

Mr. DIXON. May I just again call your Honor's attention to the patents, and to ask your Honor to bear in mind that we have 32 of these that are vested with the Alien Property Custodian.

The COURT. Well, I am not going to concentrate on that problem. I am going to leave that to you to suggest the appropriate language when, as and if we decide what to do about that.

Mr. DIXON. Yes, sir.

The COURT. I do not know whether that vesting is final or tentative or whether it is subject to recovery or recoupment or sale. I mean, we do not have enough of a record here and you gentlemen will have to agree upon some method of dealing with it.

Mr. DIXON. All right, sir.

(Adjourned to October 9, 1945, at 2.15 p.m.)

(In addition to the foregoing, there were numerous conferences attended by the Court and counsel on the decree. With the consent of all concerned, these conferences were not recorded. In connection with consideration of the decree and the Government's requests, the District Judge stated that he refused to require National Lead or du Pont to divest themselves of all or part of their domestic titanium plants and business, not for want of power to require such divestiture, but as an act of discretion.)

[Endorsement on cover.] File No. 50833, 50834, 50835. Southern New York, D. C. U. S. Term No. 89. The United States of America, Appellant vs. National Lead Company, Titan Company, Inc., and E. I. du Pont de Nemours and Company, Inc. Term No. 90. Enter Bethuel M. Webster. National Lead Company and Titan Company, Inc., Appellants vs. The United States of America. Term No. 91. E. I. du Pont de Nemours and Company, Inc., Appellant vs. The United States of America. Filed April 18, 1946. Term Nos. 89 O.T. 1946, 90 O.T. 1946, 91 O.T. 1946.

[fol. 1287] IN THE SUPREME COURT OF THE UNITED STATES

No. 89

STATEMENT OF POINTS TO BE RELIED UPON—Filed May 3, 1946

Now comes the appellant in the above entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

Dated this 30th day of April 1946.

(S.) J. Howard McGrath, Solicitor General.

Service of the foregoing statement of points to be relied upon and receipt of a copy thereof are hereby acknowledged this 1st day of May 1946.

(S.) Wm. Dwight Whitney, Counsel for E. I. duPont de Nemours and Company. Bethuel M. Webster, Counsel for National Lead Company and Titan Company, Inc.

[fol. 1288] SUPREME COURT OF THE UNITED STATES

No. 90

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed May 3, 1946

The appellants National Lead Company and Titan Company, Inc., for their statement of the points on which they intend to rely in their appeal to this Court adopt the points contained in their assignment of errors heretofore filed herein.

Said appellants respectfully refer to the stipulation dated April 30, 1946 and filed in this Court on May 13, 1946 for the parts of the record necessary for the consideration of the foregoing points and therefore designated as parts of the record to be printed by the Clerk of the Supreme Court of the United States.

Bethuel M. Webster, Counsel for Appellants, National Lead Company and Titan Company, Inc.

[fol. 1289] Service of the Foregoing Statement of Points to be Relied upon, Designation of Parts of Record Necessary for Consideration thereof is acknowledged this 2nd day of May, 1946.

(S.) Wendell Berge, Attorney for Appellee, United States of America.

[fol. 1290] IN THE SUPREME COURT OF THE UNITED STATES

No. 91

STATEMENT OF POINTS—Filed May 3, 1946

Appellant, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, states that the points upon which it intends to rely in said Court in this case are as follows:

1. Appellant hereby adopts its Assignment of Errors as and for its Statement of Points upon which it intends to rely in this case.

April 29, 1946.

(S.) Wm. Dwight Whitney, 15 Broad Street, New York, N. Y. Gerhard A. Gesell, Union Trust Building, Washington, D. C., Counsel for Appellant.

Acknowledgment of Service

Service of the foregoing Statement of Points is hereby acknowledged this 30th day of April, 1946.

(S.) J. Howard McGrath, Solicitor General of the United States, Counsel for Appellee.

[fol. 1291] IN THE SUPREME COURT OF THE UNITED STATES

No. 89. No. 90. No. 91

STIPULATION DESIGNATING PARTS OF THE RECORD TO BE
PRINTED—Filed May 3, 1946

It is stipulated that the Clerk of this Court shall print all parts of the record heretofore filed except Exhibits 1,

[fol. 1292] 2, 3, 4, 5, 24, 25, 26, 42, 43, 44, 450 through 468,

473, 474, the last two attachments of Exhibit 177 (labeled on their face as "Exhibit S" and "Exhibit T"), the last two attachments of Exhibit 600, 1229 NL Exhibits 8 through 22 and DP Exhibit 97.

April 30, 1946.

(S.) J. Howard McGrath, Solicitor General of the United States. Clifton P. Williamson, Bethuel M. Webster, Counsel for National Lead Company and Titan Company, Inc. Wm. Dwight Whitney, Gerhard A. Gesell, Counsel for E. I. du Pont de Nemours and Company.

[Vol. 1293] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

Nos. 89, 90, & 91

ORDER NOTING PROBABLE JURISDICTION—May 20, 1946

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this order.

(7771)